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SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 409

JAMES B. WILKINSON, Commonwealth's Attorney for the City of Richmond, Virginia, and FRANK S. DULING, Chief of Police for the City of Richmond, Virginia, *Petitioners,*

v.

TYRONE, INC., A Virginia corporation, trading as the Lee Art Theatre, and HOWARD WILLIAM BURTNETT, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES B. WILKINSON
Attorney for the Commonwealth for the City of Richmond, Virginia

FRANK S. DULING
Chief of Police for the City of Richmond, Virginia
By JAMES B. WILKINSON

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PRELIMINARY STATEMENT

James B. Wilkinson, Commonwealth's Attorney for the City of Richmond, Virginia, and Frank S. Duling, Chief of Police for the City of Richmond, Virginia, pray and ask that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered

on May 6, 1969, in the case of *Tyrone, Inc., a Virginia corporation, trading as Lee Art Theatre and Howard William Burtnett, Appellees,* vs. *James B. Wilkinson, Commonwealth's Attorney for the City of Richmond, Virginia and Frank S. Duling, Chief of Police for the City of Richmond, Virginia, Appellants,* which is identified by case No. 13,192. That an application for the stay for the mandate of the United States Court of Appeals for the Fourth Circuit was made on May 15, 1969, asking that said mandate be stayed for a period as provided by law so that the petitioners would have an opportunity to petition this Court for a writ of *certiorari*. The stay was so granted.

OPINIONS BELOW

The order and memorandum opinion entered in this cause by the United States District Judge for the Eastern District of Virginia, Richmond Division, dated January 15, 1969, is reported in 294 Fed. Supp. 1330 and is printed in its entirety in Appendix I, of this petition.

The opinion of the United States Court of Appeals for the Fourth Circuit has not been printed in the official reports as of this date but it is set out in its entirety in Appendix II, of this petition and is numbered 13,192 by the United States Court of Appeals for the Fourth Circuit. The petitioners are not applying for writ of *certiorari* in the case styled *Tyrone, Inc., a Virginia corporation, trading as Lee Art Theatre, and Howard William Burtnett, Appellants,* vs. *James B. Wilkinson, Commonwealth's Attorney for the City of Richmond, Virginia and Frank S. Duling, Chief of Police for the City of Richmond, Virginia, Appellees,* designated by the Court of Appeals as case 13,193. Both of the aforementioned cases were

argued in the Circuit Court of Appeals on March 7, 1969, and decided May 6, 1969, and judgment was entered on the latter date.

DATE OF DECREE SOUGHT TO BE REVIEWED

The date of the decree on which the case sought to be reviewed was entered on May 6, 1969, and there has been no application respecting a rehearing of said ruling of the Circuit Court.

STATUTORY PROVISIONS TO GIVE THIS COURT JURISDICTION TO REVIEW THE DECREE IN THIS CAUSE

The jurisdiction of the United States Supreme Court to decide the issue involved in this petition is found in 28 U.S.C.A. Section 1254 (1) and 42 U.S.C.A. 1984.

QUESTIONS PRESENTED FOR REVIEW

I.

Does the Fourteenth Amendment of the United States Constitution require that a prior adversary hearing be held on the issue of obscenity before a search warrant may issue to seize a motion picture film as evidence when the Assistant to the chief law enforcement attorney of the jurisdiction has viewed the film in the performance of his official duty with other persons and the determination was made that there is probable cause to believe the exhibition of the film is in violation of the state obscenity law?

II.

Does Title 42 U.S.C.A. 1983 give the Federal Courts the power and authority to intervene in a state criminal prosecution under the facts in the case at bar?

PROVISIONS OF THE UNITED STATES CONSTITUTION INVOLVED IN THE INSTANT CASE

ARTICLE I

Section 1.

(Legislative Powers)

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. (Volume 9, Code of Virginia, 1950, as amended, page 473).

AMENDMENT I

(Freedom of Religion, of Speech, and of the Press)

Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. (Volume 9, Code of Virginia, 1950, as amended, page 481.)

AMENDMENT IV

(Security from Unwarrantable Search and Seizure)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Volume 9, Code of Virginia, 1950, as amended, page 481.)

AMENDMENT VI

(RIGHT TO SPEEDY TRIAL, WITNESSES, etc.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (Vol. 9, Code of Virginia, 1950, as amended, page 481)

AMENDMENT XIV

Section 1.

(Citizenship Rights Not to be Abridged by States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws. (Volume 9, Code of Virginia, 1950, as amended, pages 483-484.)

FEDERAL STATUTES INVOLVED IN THE INSTANT CASE

Title 28, U.S.C.A. Section 2281

INJUNCTION AGAINST ENFORCEMENT OF STATE STATUTE: THREE-JUDGE COURT REQUIRED

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968. (United States Code Annotated, Title 28, Section 2281, page 2)

Title 42, U.S.C.A. Section 1983

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Section 1979. (United States Code Annotated, Title 42, Section 1983, page 98)

Title 42, U.S.C.A. Section 1984

SAME: REVIEW OF PROCEEDINGS

All cases arising under the provisions of this Act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other causes in said court. March 1, 1875, c. 114, Section 5, 18 Stat. 337. (United States Code Annotated, Title 42, Section 1984, page 226) 28 U.S.C.A. Section 1254 (1)

COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of *certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

CONSTITUTION OF VIRGINIA

Section 8. CONCERNING CRIMINAL PROSECUTIONS GENERALLY.—That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers; nor

be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.

Laws may be enacted providing for the trial of offenses not felonious by a justice of the peace or other inferior tribunal without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction. Laws may also provide for juries consisting of less than twelve, but not less than five, for the trial of offenses not felonious, and may classify such cases, and prescribe the number of jurors for each class.

In criminal cases, the accused may plead guilty; and, if the accused plead not guilty, with his consent and the concurrence of the Commonwealth's attorney and of the court entered of record, he may be tried by a smaller number of jurors, or waive a jury. In case of such waiver, or plea of guilty, the court shall try the case. (Vol. 9, Code of Virginia, 1950, as amended, page 492).

VIRGINIA STATE STATUTES INVOLVED IN THE INSTANT CASE

Section 19.1-85. AFFIDAVIT PRELIMINARY TO ISSUANCE OF SEARCH WARRANT; GENERAL SEARCH WARRANT PROHIBITED.—No search warrant shall be issued until there is filed with the officer authorized to issue the same an affidavit of some person reasonably describing the house, place, vehicle or baggage to be searched, the things to be searched for thereunder, alleging briefly material facts, constituting the probable cause for the issuance of such

warrant and alleging substantially the offense in relation to which such search is to be made. Such affidavit shall be certified by the officer who issues such warrant to the warrant to the county clerk of his county or to the court clerk, admitting deeds to record, of his city and shall by such clerk be preserved as a record and shall at all times be subject to inspection by the public. No such warrant shall be issued on an affidavit omitting such essentials, and no general warrant for the search of a house, place, compartment, vehicle or baggage shall be issued. (Volume 4, Code of Virginia, 1950, as amended, page 355)

Section 19.1-84. WHEN IT MAY ISSUE IN CERTAIN OTHER CASES.—On like complaint, on oath, according to the nature of the case, supported by the affidavit required by Section 19.1-85, such justice or judge to whom it is made, if satisfied that there is reasonable cause therefor, shall issue a warrant to search specified places for the following things:

****

(2) Any obscene book, print, picture, figure, object or thing used or intended for use in violation of article 3, section 18. 1-227 *et seq.*, of chapter 4 of Title 18.1 (Volume 4, Code of Virginia, 1950, as amended, 1968 Cumulative Supplement, page 128)

****

STATEMENT OF CASE

For the sake of clarity and simplification the parties in this brief will be referred to by the title as used in the District Court. That is to say, the plaintiffs will be Tyrone, Inc. and Howard William Burtnett, Jr. and defendants, James B. Wilkinson and Frank S. Duling.

This is a cause brought by plaintiffs, Tyrone, Inc., a Virginia corporation, trading as Lee Art Theatre and Howard William Burtnett, Jr. against defendants, James B. Wilkinson, Attorney for the Commonwealth for the City of Richmond, Virginia and Frank S. Duling, Chief of Police for the City of Richmond, Virginia, under Title 42, United States Code Section 1983. The plaintiffs are seeking injunctive relief. (Appendix III)

In the complaint the plaintiffs ask the District Court to restrain and permanently enjoin the defendants from further prosecution of the plaintiffs pursuant to the criminal information filed against the plaintiffs in the Hustings Court of the City of Richmond; that the motion picture "Angelique in Black Leather" and the previews or fliers of "The Same Gender" which were seized under a search warrant by police be returned to the plaintiffs; that no further seizure be made at the corporate plaintiffs' business dealing with the obscenity of the motion picture shown therein until and unless the plaintiffs have been afforded a prior adversary hearing as to the question of obscenity.

The defendants' filed motion to dismiss and also an answer to the complaint. (Appendix 4) The District Court set the case for hearing. The motion to dismiss filed by the defendants was overruled. After hearing evidence the District Court entered an order mandatority enjoining the defendants to cause to be returned to the plaintiffs all motion picture films seized by them or other officers of the City of Richmond, Virginia from the plaintiffs without first having afforded said plaintiffs a prior adversary hearing as to the question of obscennity. The District Court further ordered the defendants or any one acting in concert with them be enjoined from seizing alleged obscene motion picture films from the plaintiffs or

either of them without first affording the plaintiffs a prior adversary hearing as to the question of obscenity. The District Court refused to enjoin the defendants from the criminal prosecution of the motion picture already seized.

The order issued by the District Court was appealed to the Circuit Court of Appeals for the Fourth Circuit. Briefs were filed on behalf of all parties concerned and after being accorded an opportunity to argue the case the said Circuit Court rendered its decision May 6, 1969.

The opinion of the Circuit Court did amend the injunction granted by the District Court to the extent that the film in question "Angelique In Black Leather" should be made reasonably available to the prosecution for preparation and trial of the case in the Hustings Court of the City of Richmond. In all other respects the District Court was affirmed.

STATEMENT OF FACTS

This case was commenced on October 19, 1968, when several members of the Vice Squad of the Richmond Bureau of Police paid their admission into the Lee Art Theatre located at 934 West Grace Street, Richmond, Virginia, to view the motion picture "Angelique in Black Leather". After the officers viewed the movie, they reported their findings to defendant Wilkinson and requested that other persons also view the movie to determine if probable cause existed for issuance of a search warrant. An Assistant Commonwealth Attorney, accompanied by another lawyer, police officer and a magistrate, went to the Lee Art Theatre on October 21, 1968, to view the movie "Angelique In Black Leather". Upon their return from the movie, four police officers and two lawyers filed affidavits

with Andrew J. Winston, a Magistrate for the City of Richmond, Virginia, stating facts establishing probable cause for the issuance of a search warrant. The Magistrate which issued the search warrant personally viewed the motion picture in question.

The search warrants were issued by Magistrate Winston and the movie "Angelique in Black Leather" was seized. The following day a criminal information was filed in the Hustings Court of the City of Richmond, charging that Tyrone, Inc. "unlawfully and knowingly did a cause to be possessed, shown and exhibited in public a lewd and obscene motion picture, to-wit, "Angelique In Black Leather" ***." A separate criminal information alleged that the manager of said Theatre did "unlawfully and knowingly manage a theatre, to-wit the Lee Art Theatre at 934 West Grace Street where an exhibition of an obscene motion picture by the name of "Angelique in Black Leather" was shown and displayed to the public". The plaintiff, Howard William Burtnett, Jr., was bailed in the sum of $500.00 with surety for his appearance in the Hustings Court of the City of Richmond, and since the other plaintiff was a corporation, no bond was required.

The plaintiff then filed motions for a *subpoena duces tecum* to compel Rappahannock Theatre, Inc. to produce the film "If He Hollers, Let Him Go" and also the motion picture "Barbarella". The Honorable Samuel B. Witt, Jr., Judge of the Hustings Court of the City of Richmond, refused the issuance of the requested subpoenas.

Subsequent to this the plaintiffs, by counsel, moved the Hustings Court for an order compelling the defendants to return to the plaintiffs the motion picture film "Angelique In

Black Leather" and the previews of "The Same Gender". Judge Witt overruled this motion. The plaintiffs then filed in the United States District Court of the Eastern District of Virginia the complaint which is the subject matter of this litigation.

At the hearing in the District Court, the plaintiffs produced evidence which showed that there had been three prior seizures of motion picture films at the corporate plaintiffs' theatre. The first of said seizures was made on or about March 21, 1966, and that all of the seizures had been made with the acquiescence of the Defendant Wilkinson.

All of the seizures followed a similar course. On one seizure the movie projectors at the movie theatre were seized by the police and this cost the corporate plaintiffs a sum in excess of $1,500.00 to install temporary projection machinery and to repair and reinstall the original equipment.

The facts in the District Court are uncontradicted that the plaintiffs were not first afforded a prior adversary hearing on the question of obscenity before any of the seizures were made. It was the contention of the Defendant Wilkinson that this was not required by law. The Defendant Wilkinson also stated that he did not intend to afford a prior adversary hearing before seizure of obscene material until this became a requirement of law.

As a result of the early seizures, all of these cases have been tried and the corporate plaintiff found guilty except on one film which was voluntarily returned to the plaintiff.

In the first case, the two films in question, to-wit, "The Erotic Touch of Hot Skin" and "Rent-A-Girl" were found to

be obscene by a jury and this verdict received the approval of the trial judge. The Supreme Court of Appeals of Virginia refused a writ of error. On June 17, 1968, the United States Supreme Court reversed these cases in a *per curiam* decision. In its *per curiam* decision the Court did not reach the question of obscenity but reversed the case on the search warrant.

The second case involved the motion picture "A Taste Of Honey And A Swallow of Brine" which was also tried in the Hustings Court of the City of Richmond by a jury and the corporate plaintiff was found guilty under the Virginia statute. The jury verdict received the approval of the trial judge. This case is now pending before the Supreme Court of Appeals of Virginia as a writ of error was granted by said Court.

The third case involved the motion pictures "Night of Lust" and "Love Cult" and they were tried in the Husting Court of the City of Richmond without the intervention of a jury and found guilty. The corporate plaintiff did not appeal these convictions and accordingly, the judgment became final. The motion picture "Dirty Girls" was returned to the corporate plaintiff.

On each occasion where the corporate plaintiff was found guilty of displaying in public an obscene motion picture it was fined the sum of $500.00. The projectors seized under the search warrants on the second seizure have been returned to the corporate plaintiff.

JURISDICTION

The jurisdiction of this Court is invoked for the following reasons:

(a) there appear to be conflicts between the Circuits as to whether or not a prior adversary hearing is necessary before material may be seized as being obscene for a criminal prosecution;

(b) The Court of Appeals for the Fourth Circuit has decided an important question of Federal law which has not been but should be settled by this Court;

(c) the Court of Appeals for the Fourth Circuit has decided a question of Federal law which is in conflict with the applicable decision of the United States Supreme Court.

I.

ARGUMENT

The issue in this case is whether or not prior to the seizure of obscene material the distributor thereof is entitled to a prior adversary hearing as to the question of obscenity. The plaintiffs rely heavily on the case of *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964) and the case of *Metzger* v. *Pearcy*, 393 F.2nd 202 (1968).

Books v. *Kansas* was not a majority opinion of the United States Supreme Court as only four Justices, namely, Justices Brennan, Goldberg, White and Chief Justice Warren joined in the opinion. Justices Black and Douglas expressed the view that under the First Admendment nothing is obscene. Mr. Justice Stewart's reasoning in the case was that it was not hard core pornography and was protected material. Justices Harland and Clarke dissented from the ruling of the Court. 5 A.L.R. 3rd 1226. See also *U.S.* vs. *Pink*, 315 U.S. 203 at page 216:

> "The lack of an agreement by a majority of the court on the principles of law involved prevents it from being an authoritative determination for other cases. *Hertz* v. *Woodman*, 218 U.S. 205 . . . ."

In *Books* it should be noted that this was a civil proceeding against a large number of books which were seized prior to any determination of whether or not the material contained in them was obscene or not. The officers in the Kansas case did not seize only one copy of each alleged obscene book but all copies totaling 1,715 books. This aspect of the case alone distinguishes it from the present case.

There is no evidence for the Court to find that had the plaintiffs had more than one copy of "Angelique" that the police would have seized the additional copies and thereby been suppressing the freedom of thought and speech. In the case at bar the film that was seized under the search warrant was only seized after there had been a procedure set up "designed to focus searchingly on the question of obscenity." *Marcus* v. *Search Warrant*, 367 U.S. 717, 731-732 (1961).

The first officers who observed the motion picture in question did not seize the movie nor did they make any arrest but reported their findings to the Commonwealth's Attorney. The prosecuting officer requested other police and two lawyers along with the magistrate to see the movie. After these precautions were taken, six affidavits were filed according to law and the magistrate personally observed the motion picture before he issued a search warrant for the theatre and the motion picture was seized. It is clear, that the police and the prosecuting authorities in the City of Richmond had devised a plan whereby there should be a searching inquiry on the question of obscenity before any search warrant could be issued in this

jurisdiction for the seizure of obscene material. The lesson taught in the *Lee Art Theater, Inc.* v. *Virginia,* 88 U.S. 2103 (1968) was well learned and is being followed in this jurisdiction.

To establish more rigid rules for the issuance of a search warrant would put the purveyors of smut and filth beyond the reach of valid State laws. If the relief sought by the plaintiffs is granted, it would relieve the Court of its ancient and respected responsibility and duty of being the keeper of the public morals and abdicate this responsibility and duty to the smut and filth dealers. These dealers would replace the Courts as the guide and keeper of the nations' conscience.

There is no procedure in Virginia for a prior adversary hearing as to obscenity before seizure of obscene material in a criminal prosecution. If the Court were to require this it would allow motion pictures to be shown to the public depicting any and every sexual act, perverted or otherwise, known to man with immunity. After the prior adversary hearing the motion picture would be out of the City and not shown any more but the damage would be done.

In *Metzger* v. *Pearcy, supra,* more law is found in the footnote than in the opinion. The motion picture "I, A Woman", which had been seized in that case, had been declared to be protected under the First Amendment in several other jurisdictions. Some deletions had been made prior to its being shown. It is submitted that the Court in that case relied on *Books* v. *Kansas, supra,* but the case could have been decided under *Marcus* v. *Search Warrant, supra.*

In *Metzger* the officers arrested the exhibitor and seized the film claiming a misdemeanor had been committed in their

presence. There was no independent judicial detemination and affidavits filed prior to the arrest as are present in this case. It is submitted that *Metzger* is not applicable to this instant case and is readily distinguishable.

The question of obscenity is a question for the jury under proper instructions of the Court. By the procedure suggested by the plaintiffs the State would be deprived of its constitutional right of trial by jury as found in the Sixth Amendment of the United States Constitution as applied to the states through the Fourteenth and Section 8 of the Virginia Constitution. The defendants are ready, able and willing to submit this issue to a jury for its determination which is also one of the great rights under the Constitution.

In essence, the plaintiffs are endeavoring to deprive society of its right of trial by jury by having only a judge pass on the question of obscenity. The defendants having great faith in our system of trial by jury strongly urge this Court not to take such a solemn right away from the people as the plaintiffs are urging.

When two rights are in conflict with one another they must be carefully weighed so both may prevail with equal dignity. That is the reason the defendants have offered the plaintiffs a quick, speedy and fair trial in all of the cases. If the material is found not to be obscene by the jury then it should be released, but if the holding is contrary to that, then those responsible for its distribution should be punished.

There is no greater adversary hearing known to man than the criminal trial. The burden of proof beyond a reasonable doubt being on the prosecution, the presumption of innocence

of the accused certainly gives great protection. The criminal trial must remain a search for the truth and the defendants are affording the plaintiffs that right. The defendants are now, have been, and will in the future be willing to proceed with this case at an early date if the plaintiffs are so disposed in a trial in the Hustings Court of the City of Richmond.

A search of the First, Fourth and Fourteenth Amendments to the United States Constitution shows there is no requirement that a person who distributes obscene material receive a prior adversary hearing before he may be arrested for violating a State law prohibiting the dissemination of such materials. It has long been recognized by the ruling of this Court and all other Courts throughout the United States that obscenity is not protected material under the First Amendment. *Roth* v. *U.S.*, 354 U.S. 476, 1 L.Ed. 2nd 1498, 77 S.Ct. 1304; *Alberts* v. *California*, 354 U.S. 476, 1 L.Ed. 2nd 1498, 77 S. Ct. 1304. Although the two cases just cited were decided in 1957 the Court did not indicate or suggest that a prior adversary hearing was necessary before a criminal prosecution could be had in this field of criminal justice.

Only recently this Court in the case of *Ginsberg* v. *New York* 390 U.S. 629 (1968) held that a New York statute forbidding sale of obscene materials to persons under 17 years of age was not void for vagueness. The Court affirmed a conviction of the sale of obscene material to a minor. There was no hearing required in this case. Should the Court hold that an adversary hearing is a prerequisite to the seizure of obscene material the children of the nation would be left to the whims of the purveyors of pornography. This would be contrary to the ruling in *Ginsberg, supra.*

Although the Circuit Court did not say that an adversary hearing was necessary before a person could be arrested for selling obscene material to a minor the natural inference from the ruling would make this a fact.

Under the ruling of the Court of Appeals for the Fourth Circuit the rights of a Grand Jury to investigate a syndicated group or a person selling pornographic materials in a community would be without force or effect. The Grand Jury is not an adversary proceeding. Therefore, they would be helpless to bring about an arrest on materials, where there exists probable cause that they are obscene. To hold that a prior adversary hearing is necessary before items could be seized to be used in a criminal prosecution would take away another right of the people. This would make the Grand Jury no more than a sham. The Grand Jury would lose its inherent power to investigate in this particular field of criminal justice. Certainly the Court would not want to take this solemn and sacred right away.

In *Lee Art* v. *Virginia, supra,* this Court reversed a conviction of the Lee Art Theatre, Inc., for showing an obscene motion picture in public. The Court in its *per curiam* decision in reversing the case never vited *Books* v. *Kansas, supra,* but did cite *Marcus* v. *Search Warrant, supra,* That decision strongly suggests that the magistrate should have viewed the motion picture in question before issuing a warrant. It is respectfully submitted that it was never the intention of the Court to have the rule announced in *Books* v. *Kansas, supra,* to apply in a criminal prosecution where the act is punished and not the thought or idea.

Realizing the importance of the freedoms under the First Amendment of the United States Constitution as applied to

the states through the Fourteenth Amendment, the defendants herein have endeavored to follow every procedural safeguard for the protection of the freedom of speech. It must be remembered that six persons stated under oath their opinion as to the obscenity of the motion picture in question. One of these persons was an independent lawyer and another one an Assistant Commonwealth's Attorney, both of which, were schooled in the law. The Magistrate, who is an independent judicial officer, satisfied himself as to the obscenity of the motion picture before issuing the search warrant.

It is perfectly clear to the defendants that under the present law obscene materials are not contraband and that there are different standards governing seizure of allegedly obscene material than apply to contraband. This Court stated that obscene material was in a different category from narcotics, gambling paraphenalia and other contraband in *Marcus*. However, this Court in *Warden* v. *Hayden*, 387 U.S. 294; 18 L.Ed 2nd 782; 87 S. Ct. 1942 (1967) decided that there is no longer a distinction between the seizure of items of an evidential nature only and the seizure of instrumentalities, fruits or contraband.

In *Hayden, supra*, this Court held that mere evidence could be seized if the evidence so sought would aid in a particular apprehension or conviction of a person accused of a crime. All the police did in this case was to seize a film as evidence under a search warrant, after taking great care and caution to prove that probable cause existed, for the seizure of the film. This film was seized as evidence to assist in the prosecution and conviction of the accused for violating the law of showing an obscene motion picture in public. This Court held in clear

and precise language that there was not viable reason to distinguish intrusions to secure "mere evidence" from intrusions to secure fruits, instrumentalities or contraband.

This Court in the case of *Kingsley Books, Inc.* vs. *Brown,* 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S. Ct. 1325 held that the due process clause of the Fourteenth Amendment did not restrict a State in seeking to protect its people against the dissemination of pornography. Mr. Justice Frankfurter speaking for the majority stated as follows:

> "We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in restorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. See *Tigner* v. *Texas,* 310 US 141, 148, 84 L ed 1124, 1128, 60 S CT 879, 130 ALR 1321 If New York chooses to subject persons who disseminate obscene "literature" to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard, of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies. Just as *Near* v. *Minnesota,* 283 US 697, 75 L ed 1357, 51 S Ct 625, *supra,* one of the landmark opinions in shaping the constitutional protection of freedom of speech and of the press, left no doubts that "Liberty of speech, and of the press, is also not an absolute right," 283 US at 708, it likewise made clear that "the

protection even as to previous restraint is not absolutely unlimited." *Id.* 283 US at 716. To be sure, the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship."

Mr. Justice Brennan in his dissenting opinion noted that the New York procedure in the *Kingsley* case was fatally defective because a person was not afforded trial by jury. This was opposite from the present case because without question the plaintiffs would be entitled to trial by jury on the issue of obscenity when the instant case is tried on its merits.

The plaintiffs have always been offered a speedy trial on the question of obscenity and their trial could have been had within one week from the date of the seizure if they so desired. This was not a procedure concocted by the police to suppress protected materials but a criminal prosecution to enforce the laws of this Commonwealth against public obscenity. The police and prosecuting attorney are both under legal obligation to enforce the criminal laws of this State. After according the plaintiffs procedural due process they were only discharging their duty imposed upon them by law.

It has been repeatedly held that the liberty of speech is not absolute and that all previous restraints on speech are not invalid. In *Times Film, Corporation* vs. *City of Chicago,* 365 U.S. 43 (1961) this Court cited with approval the following at page 48:

"Some years later, a unanimous Court, speaking through Mr. Justice Murphy, In *Chaplinsky* v. *State of New Hampshire,* 1942, 315 U.S. 568, 571-572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 held that there were "certain

> well defined and narrowly limited classes of speech the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

The instant case is not prior restraint because the plaintiffs showed the motion picture in question. The warrant is an allegation that the motion picture "Angelique" is obscene. The only evidence before any court is to the effect that the allegation is true. The plaintiffs introduced no evidence in the District Court asserting that "Angelique" was not obscene. No witnesses were called nor was the District Judge given an opportunity by the plaintiffs to observe the motion picture in question. There is absolutely no evidence before any court that "Angelique" is protected material. At this stage of the proceeding all of the evidence is to the contrary.

In the case *Schackam* vs. *Arnebergh,* 258 Fed. Supp. 983 (1966) appeal dismissed 387 U.S., 427, held that no prior adversary hearing was necessary as to the question of obscenity before a person could be arrested and the allegedly obscene material seized. This decision certainly strongly indicates that there is no requirement for a prior adversary hearing prior to the seizure of a motion picture film for being obscene. (See also *Holden* vs. *Arnebergh,* 71 Cal Rep 401, Appeal dismissed 89 S.Ct. 926 (1969))

With the District Court in California holding as it did in the above mentioned case there is a conflict on this point among the various Federal Circuits in the United States. It creates different rules of Federal law in the different parts

of the country. Since this situation exists this Court should settle the issue for one and all. If this issue is not settled a person can be prosecuted under California law without a prior adversary hearing but in the Fourth and Seventh Circuits such a hearing would be required. Only the Fourth and Seventh Circuits at this date require the adversary hearing in obscenity prosecutions. Why should Federal law differ?

To require an adversary hearing before seizure of obscene material would make the purveyors of the material contained in the seven brown envelopes (only one copy is filed with this brief) entitled to such a hearing. Any one can look at this material and tell that it is obscene and not protected under the First Amendment. What sense would it make to have an adversary hearing to show the obvious?

If an adversary hearing is required in one case it must necessarily be required in all cases. *Marcus* sets forth rules which can be understood and followed which adequately protects First Amendment rights and also society against a flood of pornography.

For the foregoing reasons it is respectfully submitted that there is no rule of law found in the Constitution, statutes of both Federal and State, that would require a prior adversary hearing as to the question of obscenity before alleged obscene materials can be seized under a valid search warrant. The only requirement is that there be a search focused on the question of obscenity before seizure as set forth in *Marcus*. This rule and the construction of First Amendment rights have been followed in the instant case before the court.

II.

This suit was commenced in the Federal Court by the filing of a complaint by the plaintiffs against the defendants under

Title 42 U.S.C.A. Section 1983. This Section gives the Federal Courts the power and authority to intervene when a person is being deprived of some of his legitimate civil rights under the United States Constitution or laws passed pursuant to that instrument. It is submitted that before the remedies provided in this Section would be applicable there must be a clear civil right that is being violated by state officials.

There is no evidence before the Court that the movie "Angelique" is protected material under the First Amendment to the United States Constitution. The Virginia statutes which were used to seize the aforesaid movie clearly give the State officials the right and duty to act as they did.

The defendants were acting under valid State laws. Section 19.1-85 of the Code of Virginia, 1950, as amended, sets out the procedure to obtain a search warrant in this jurisdiction. This section was complied with in the instant case prior to the seizure of any motion picture. The necessary elements set forth in the Code Section for the issuance of a search warrant comply with the mandates of the Fourth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment.

Section 19.1-84 of the Code of Virginia, 1950, as amended, sets out the things that can be searched for under a search warrant in Virginia. The Magistrate having found probable cause for the issuance of a search warrant had authority to issue the warrant pursuant to this Section. The Magistrate personally observed the motion picture issued under the warrant prior to its issuance.

Article 3 Chapter 4, Title 18.1 of the Code of Virginia, 1950, as amended, deals with the question of obscenity in

this State. This Article enumerates various obscene items that are unlawful for commerical public distribution. Motion pictures are covered by this Article. No part of this Article has been ruled unconstitutional by any court in a reported case. The plaintiffs do not raise the constitutionality of the Virginia obscenity statute in this proceeding.

Neither the District Court nor the Circuit Court of Appeals in their decisions ruled any Virginia statute unconstitutional. It would be necessary for the Court to have ruled one of the above-mentioned statutes unconstitutional before it could grant the relief sought by the plaintiffs.

The plaintiffs do not question the fact that the affidavits for the search warrant set out probable cause for the search (Affidavits—Appendix V).

In essence, the District Court and Circuit Court of Appeals placed on the defendants requirements not found in the United States Constitution, Constitution of Virginia or the statutory laws passed by either sovereignty in their respective enforcement of laws against public obscenity. Every freedom granted to the American people under the Constitution would go for naught and be of little benefit if laws can be enacted in any other manner than as provided in the Constitution. Article I, Section I, United States Constitution.

It is unquestionable that the Court can declare laws unconstitutional. However, in the instant case, a single judge in the District Court does not have this authority or power. It takes a three judge District Court to so act. 28 U.S.C.A., Section 2281.

State officials acting under an unconstitutional law in bad faith are subject to the jurisdiction of the Federal Court and can be enjoined from the enforcement of such laws. *Dombrowski* v. *Pfister*, 380 U.S. 483. The facts in this case do not justify this action as it is apparent that the defendants acted in the utmost good faith in enforcing valid State laws against obscenity. *Cameron* v. *Johnson*, 88 U.S. 1335.

Both the District Court and the Court of Appeals concluded from the facts that the defendants were acting in the utmost good faith in the prosecution against the plaintiffs. This Court in *Johnson* vs. *Cameron, supra*, at page 618, stated as follows:

> "Federal interference with a State's good-faith administration of its criminal laws 'is peculiarly inconsistent with our federal framework' and a showing of 'special circumstances' beyond the injury incidental to every proceeding brought lawfully and in good faith is requisite to a finding to irreparable injury sufficient to justify the extraordinary remedy of an injunction."

The Court further stated in *Johnson* that it was the duty of local authorities to enforce in good faith the laws passed by the State. The defendants are only doing that which the law demands in this case.

Dombrowski, supra, sets forth two separate and distinct categories of circumstances in which the exercise of federal equity power to restrain state criminal prosecutions is appropriate. The first relates to situations in which statutes are challenged on their face as overly broad and vague regulations of expression. The second is actually threatened prosecutions under the statute. Neither element is present in the case at bar.

In the instant case there was no necessity for the intervention of the federal courts. The procedure used by the police on advice of the prosecuting attorney was in good faith and met constitutional standards.

Books vs. *Kansas, supra,* having been decided in 1964, has not brought about any legislation to formulate a procedure to have a prior adversary hearing as to the question of obscenity before the material is seized. Apparently the Legislative branch of government did not feel that *Books* changed the law whereby a prior adversary hearing would be necessary.

It is respectfully submitted that the ruling of the Court of Appeals for the Fourth Circuit, intervening in the State criminal prosecution, is contrary to the authority granted by Congress to the Courts under the facts in the instant case.

The time-honored, judicious precept that a Federal Court should never interpose its decree between a State and a criminally accused, save unusual circumstances, is presented in the instant case. Aptly speaking to this point for the United States Supreme Court in *Wilson* v. *Schnettler,* 365 U.S. 381, 81 S. Ct. 632, 635, 5 L. Ed. 2d 620, Justice Whittaker summarized the doctrine in this language:

> "* * * If, at the criminal trial, the Illinois court adheres to its interlocutory order on the suppression issue to petitioner's prejudice, he has an appeal to the Supreme Court of that State, and a right if need be to petition for 'review by this Court of any federal questions involved.' *Douglas* v. *City of Jeannette,* 319 U.S. 157, 163 (63 S. Ct. 877, 881, 87 L.Ed. 1324). It is therefore clear that petitioner has a plain and adequate remedy at law in the criminal case pending against him in the Illinois court.

"There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embrassing conflicts unless rules were adopted to void them. Such rules have been adopted. One of them is that an accused 'should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial.' *Ponzi* v. *Fessenden,* 258 U.S. 254, 259 (42 S.Ct. 309, 310, 66 L.Ed. 607) Another is that federal courts should not exercise their discretionary power 'to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is both clear and imminent; * * *' *Douglas* v. *City of Jeannette, supra,* (319 U.S.) at 163 (63 S.Ct. at page 881)."

The rules laid down by this Court appeared first in *Kingsley Books, Inc.* vs. *Brown, supra.* In *Kingsley* this Court upheld New York's civil antiobscenity procedure against an attack based on First Amendment principle.

Marcus vs. *Search Warrant, supra,* gave us a workable sensible rule to follow. *Marcus* was reversed by this Court because there was not a search focused primarily on the question of obscenity as is present in the instant case.

As previously stated, the case of *Books* vs. *Kansas, supra,* is distinguished from the instant case. It should be noted that in all three of these cases there was no intervention of the

Federal Court in the State prosecutions, but normal appeals through the judicial system as provided in the Constitution and laws of the United States.

This case is clearly one for the rule laid down by this court in *Douglas* v. *City of Jeannette,* 63 S.Ct. 877 and is as follows:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a cuit for an injunction. *Davis & Farnum Mfg. Co.* v. *City of Los Angeles,* 189 U.S. 207, 23 S. Ct. 498, 47 L. Ed 778; *Fenner* v. *Boykin,* 271 U.S. 240, 46 S. Ct. 492, 70 L. Ed. 927. Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate.' *Spielman Motor Sales Co.* v. *Dodge,* 295 U.S. 89, 95, 55 S.Ct. 678, 680, 79 L.Ed. 1322, and cases cited; *Beal* v. *Missouri Pac. R. Corp.,* 312 U.S. 45, 49, 61 S. Ct. 418, 420, 85 L. Ed. 577; and cases cited; *Waston* v. *Buck,* 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416; *Williams* v. *Miller,* 317 U.S. 599, 63 S.Ct. 258, 87 L.Ed.—."

Since none of the Virginia statutes were ruled unconstitutional by the Court, and the film was only seized after six affidavits were filed, according to law, and personal observation was made by a judicial officer, it is submitted that the Federal Court had no right or authority under Section 1983 to intervene in the State criminal prosecution. There has been no showing of a violation of any constitutional rights claimed by the plaintiffs. *Cameron* vs. *Johnson, supra,* states when and under what circumstances the jurisdiction of the Federal courts can be invoked against the enforcement of state laws. The District Court and Court of Appeals disregarded the clear mandate of the rule in *Johnson.*

CONCLUSION

Being mindful that the primary issue involved in the instant case is not the obscene nature of the motion picture the intervention by the Federal Court was commenced because of the State criminal prosecution. While the courts have vacillated and over-explained, divided and fought, the sentiments of the people of this country have been clear and unassailable. All fifty states of this nation have obscenity laws. It seems to be universally believed everywhere, except in the halls of the judiciary, that obscenity as such is not entitled to the constitutional protection awarded free speech.

Down through the years we have been asking ourselves when dealing with pornography and obscenity, "Is it harmful?" An answer cannot come without a certain amount of reservation because the proof is hard to come by and often inconclusive. Perhaps we should ask, "Is it beneficial?" the answer would come loud and clear. No benefit can come to any individual or any society by the use or dissemination of pornographic and obscene material. This being so why should we longer expend the time and energies of the greatest minds

of this country in preserving its presence upon the newsstands and in the theatres.

It is respectfully submitted that the issue of obscenity as other issues of fact should be submitted to juries under proper instructions from the court and let the people decide. This is our system of ordered liberty.

The petitioners, James B. Wilkinson and Frank S. Duling, respectfully pray that:

1. the decree of the Court of Appeals for the Fourth Circuit be reversed in so far as it requires a prior adversary hearing to be held before alleged obscene material can be seized;

2. the petitioners be not required to return to Tyrone, Inc. or William Howard Burtnett the motion picture "Angelique In Black Leather" until after the criminal trial in the State Court and then only if the said motion picture is found to be protected material under the First Amendment to the United States Constitution; and

3. that this Court favorably rule that the Federal courts should not have intervened in the instant case which is a legitimate and legal State criminal prosecution.

Respectfully submitted,
JAMES B. WILKINSON
Attorney for the Commonwealth for the City of Richmond, Virginia

FRANK S. DULING
Chief of Police for the City of Richmond, Virginia
By JAMES B. WILKINSON

City Hall—Room 103
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, James B. Wilkinson, Attorney for the Commonwealth for the City of Richmond, Virginia, counsel for the petitioners in the captioned matter, and a member of the bar of the Supreme Court of the United States, do hereby certify that on this 30th day of July, 1969, I mailed a copy of the foregoing Petition for a Writ of *Certiorari* to the Judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to Joseph S. Bambacus, Esquire, Attorney at Law, Mutual Building, Room 418, Ninth and Main Streets, Richmond, Virginia 23219 counsel for the respondent herein.

JAMES B. WILKINSON

Attorney for the Commonwealth for the City of Richmond, Virginia

Appendix I.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TYRONE, INC. a Virginia corporation, trading as Lee Art Theatre
and
HOWARD WILLIAM BURTNETT

v

JAMES B. WILKINSON, Commonwealth's Attorney or the City of Richmondmond, Virginia
and
FRANK S. DULING, Chief of Police for the City of Richmond, Virginia

CIVIL ACTION

NO. 6051-R

MEMORANDUM

This is an action brought by plaintiffs seeking injunctive relief from the seizure of motion pictures and from criminal prosecutions based on the alleged offense of obscenity.

The Court, having considered the pleadings, exhibits and statements of counsel, and the evidence of witnesses, finds as follows:

Jurisdiction of the Court is invoked under Title 42 United States Code § 1983.

Plaintiff is a corporation operating a movie theater in the City of Richmond, within this district; the individual plaintiff is a resident of Richmond, Virginia, and was a manager of the movie theater on October 21, 1968; the defendant, Wilkinson, is the prosecuting attorney for the City of Richmond, Virginia; and the defendant, Duling, is the Chief of Police for the said city.

On or about March 21, 1966, with the acquiescence of the defendant, Wilkinson, members of the Police Department, one of whom had not attended a movie theatre for some five to ten years prior thereto, commenced a series of raids on the Lee Art Theatre, operated by the corporate plaintiff. In each instance the *modus operandi* would be for one or more police officers to view the films, prepare affidavits after consultation with the Commonwealth's Attorney, and secure a search warrant. In at least three instances in 1966 this procedure was followed, search warrants secured, and the officers seized certain films being shown by the corporate plaintiffs. The plaintiffs were prosecuted and found guilty in all three instances of having "exhibited in public a lewd and obscene motion picture." In one case the United States Supreme Court reversed the conviction; in a second, the Supreme Court of Appeals of Virginia has issued a writ of error and will hear the matter; and in the third, judgement of guilt became final without any appeal.

As a result of one of the raids, the corporate petitioner was forced to expend a sum in excess of $1,500.00 to install temporary projection machinery and to repair and re-install

original equipment which the police officers had seized as having been used for the commission of a crime.

It is uncontradicted that the seizure of all of the films was accomplished without any prior adversary hearing on the question of obscenity. This by reason of the defendant, Wilkinson's, view that the law doesn't require an adversary hearing prior to the seizure of the films in question. The Commonwealth's Attorney very frankly states to the Court that he does not intend to afford a prior adversary hearing in the event search warrants are secured for films which may be shown in the future unless and until, as he put it, he is satisfied that he is required to do so under the law.

As a result of a viewing of a film being shown by the plaintiff corporation, affidavits were filed by certain police officers and other parties affirming that each affiant "had witnessed a movie at Lee Art Theatre, 934 W. Grace Street and found it to be obscene without redeeming social value and it goes substantially beyond community standards in the display of nudity and sex and the dominant theme or purpose appeals to the prurient interest," and upon their application a search warrant was issued, the theater raided, and the allegedly obscene films confiscated and delivered to the City Sergeant for the City of Richmond. There was admittedly no prior adversary hearing prior to either this issuance of a search warrant or the seizure of the films. It should be noted that the magistrate who issued the search warrant likewise viewed the film prior to the issuance of said warrant.

Subsequent to said seizure, criminal informations were filed at the instance of the Commonwealth's Attorney, Wilkinson, charging the corporation and the plaintiff, Burtnett, with having unlawfully possessed, shown and exhibited in public a

lewd and obscene motion picture in violation of the laws of Virginia. It would appear that the plaintiffs are charged with having violated the statutory laws of Virginia in reference to obscenity. See Title 18.1-227, etc., Code of Virginia 1960.

The plaintiffs ask this Court for equitable relief directing that the defendants return the prints of the motion picture films seized as aforesaid, and ask the Court to restrain the defendants, and all persons in concert with them, from seizing any prints of movie films, or otherwise interfering with the exhibition of any films exhibited by plaintiffs, prior to a determination of obscenity in an adversary proceeding. In addition, plaintiffs ask the Court to restain the defendants from the further prosecution of the plaintiffs pursuant to the criminal informations filed by the defendant, Wilkinson, in the Hustings Court of the City of Richmond.

Defendants have moved the Court to dismiss the complaint and in argument before the Court, in essence denied that they are bound by certain opinions of the Supreme Court of the United States.

The facts are generally undisputed. It should be borne in mind that questions of abstention and of injunctive relief are not the same. See *Dombrowski* v. *Pfister,* 380 U.S. 483, at 489. Wherever federal courts sit, rights under Federal Consituation are always a proper subject for adjudication. See *Zwicker* v. *Koota,* 390 U.S. 241 (1967).

The plaintiffs in the instant case allege a violation of Constitutional rights. The real issue is whether the procedures meployed by the defendants are Constitutionally insufficient by their admitted failure to take appropriate steps to adequately sateguard against the suppression of non-obscene movie films.

There can be no doubt but that it has certainly, since 1951, been settled that motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secure to any form of "speech" or "the press." The establishment of the Constitutional guarantees of freedom of speech and press have, since the case of *Barstyn* v. *Wilson*, 343 U.S. 495, been consistently followed. [Note: *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959); *Jacobellis* v. *State of Ohio*, 378 U.S. 184 (1964); *Metzger* v. *Pearcy*, 393 F. 2d 202 (1968).]

It should be noted that the Virginia law provides a method which, although not required by Virginia law, may be employed in order to afford an adversary hearing in proceedings against movie film alleged to be obscene. See 18.1-236.3 Va. Code 1960, and 1968 supplement 18.1-236.4.

The Court does not find it necessary to pass upon the Constitutionality of any Virginia statute, nor must this Court pass upon the alleged obscenity of the movie films in question.

Defendant, Wilkinson, has testified that he did not employ the procedure afforded under the Virginia statute aforementioned prior to acquiescing in the seizure on the grounds that he did not think it fair to subject one to a civil proceeding and then perhaps subsequently prosecute.

It is difficult for this Court to recognize the logic of subjecting a person first to a criminal prosecution, with the attendant notariety, by reason of a desire not to put one to the difficulty of a civil proceedings. There is no doubt in this Court's mind but that the seizure of the films in the instant case, and the manner in which it was done, falls short of due process. An informal gathering of police officers, prosecuting authorities,

and a magistrate who issued a search warrant, by reason of their having purchased admission tickets to a theater and having viewed the film in question, does not amount to due process.

In order to properly protect the freedoms afforded by the First Amendment to the Constitution of the United States, there must be conformity to procedures that insure against the curtailment of Constitutionally protected expression which, as stated in the case of *A Quantity of Books* v. *Kansas*, 378 U.S. 205, "is often separted from obscenity only by a dim and uncertain line."

The object of an adversary hearing is to insure that expression will not be suppressed without contest and justification. An adversary proceeding contemplates an opportunity for one to be afforded the protection of the First Amendment to the Constitution of the United States. Allegedly obscene publications or movies are not to be treated the same way as narcotics, gambling paraphernalia and other contraband. The legal rules governing the former are different from the latter. *Metzger* v. *Pearcy, supra.*

The defendants' argument that they are not bound by the decision of the *Books* v. *Kansas* holding of the United States Supreme Court, coupled with the defendant, Wilkinson's, announced intention to continue the authorizing of the seizure of allegedly obscene motion pictures without affording the possessors and exhibitors of same a prior adversary hearing to determine if same are obscene, leaves this Court no alternative except to issue an oppropriate injunction.

The freedom of press and expression, whether it be through newspapers or motion pictures, is too precious a freedom to permit the risk of suppression of non-obscene material simply because a law enforcement officer announces an intention not to afford a prior adversary hearing unless directed to do so by a Court or his present interpretation of the *law changes.*

An appropriate order directing the defendants to cause to be returned the pictured film seized on October 21, 1968, will be entered, and defendants and all acting in concert with them will be enjoined from seizing allegedly obscene motion pictures without affording a prior adversary hearing to the possessors and exhibitors of same. The Court finds no valid reason why it should not refrain from granting equitable relief from the criminal prosecution now pending; if plaintiffs did in fact possess and exhibit obscene motion picture films in violation of law a prosecution of same is entirely appropriate. The instant case differs from the case of *Dombrowski, supra,* in this regard in that the Court does not find bad faith on the part of the defendants which might constitute a ground for said equitable relief from State court criminal proceedings. On the contra, while disagreeing with the defendants' contentions, the Court has no reason to believe that they acted in anything but good faith, and plaintiffs' prayer for an injunction enjoining the defendants from the pending criminal prosecution will be denied.

The defendant, Wilkinson, having announced his intention to apply to the Fourth Circuit Court of Appeals for immediate relief from this Court's order, said order will contain a provision that same be stayed for a period of ten days in order to afford the defendants the opportunity requested.

An order in conformance with this memorandum will be entered.

/s/ Robert R. Merhige, Jr.
United States District Judge

January 15, 1969.

A true copy—Tests:
Clerk, U.S. District
Court.

by R. R. Merhige, Jr.
Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TYRONE, INC. a Virginia corporation, trading as Lee Art Theatre
and
HOWARD WILLIAM BURTNETT

v.

JAMES B. WILKINSON, Commonwealth's Attorney for the City of Richmond, Va.
and
FRANK S. DULING, Chief of Police for the City of Richmond, Va.

CIVIL ACTION
No. 6051-R

ORDER

For the reasons stated in the memorandum this day filed and the Court deeming it proper so to do, it is ADJUDGED and ORDERED that the defendants' motion to dismiss be, and the same is hereby denied; the defendants and all acting in concert with them be, and they are hereby, mandatorily enjoined to cause to be returned to the plaintiffs all motion picture films seized by the said defendants or other officers

of the City of Richmond, Virginia, from the plaintiffs, without having afforded said plaintiffs a prior adversary hearing; and the said defendants and all acting in cencert with them be, allegedly obscene motion picture films from the plaintiffs, or and they are hereby, permanently enjoined from seizing either of them, without affording a prior adversary hearing to the said plaintiffs.

It is further ORDERED that plaintiffs prayer for an injunction enjoining the defendants from criminal prosecution referred to in the memorandum be, and the same is hereby denied.

This order is stayed for a period of ten days from this date for purposes of permitting the defendants to apply to the Fourth Circuit Court of Appeals for such relief as they deem appropriate.

The plaintiffs shall recover their costs expended in this action.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

January 15, 1969.

A true copy—Teste:
Clerk, U. S. District Court

Deputy Clerk.

Appendix II.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13,192

TYRONE, INC., a Virginia corporation, trading as Lee Art Theatre, and HOWARD WILLIAM BURTNETT, Appellees,

versus

JAMES B. WILKINSON, Commonwealth's Attorney for the City of Richmond, Virginia, and FRANK S. DULING, Chief of Police for the City of Richmond, Virginia Appellants.

No. 13,193

TYRONE, INC., a Virginia corporation, trading as Lee Art Theatre, and HOWARD WILLIAM BURTNETT, Appellants,

versus

JAMES B. WILKINSON, Commonwealth's Attorney for the City of Richmond, Virginia, and Frnak S. DULING, Chief of Police for the City of Richmond, Virginia, Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

(Argued March 7, 1969 Decided May 6, 1969).

Before, SOBELOFF, WINTER and BUTZNER, Circuit Judges.

James B. Wilkinson, Commonwealth's Attorney for the City of Richmond, Virginia, for appellants in No. 13,192 and appellees in No. 13,193; T. Wilson Hotze, Jr. and Joseph S. Bambacus for appellees in No. 13,192 and appellants in No. 13,193.

BUTZNER, Circuit Judge:

In October 1968 the defendants, the Commonwealth's Attorney and the Chief of Police for the City of Richmond, seized the film, "Angelique in Black Leather," at the Lee Art Theatre, which is operated by the plaintiffs.[1] They had a search warrant secured upon affidavits of four police officers and two lawyers, who, along with the magistrate who issued the warrant, had all viewed the film. Subsequently, the theatre was charged with possessing and exhibiting an obscene movie.[2] The theatre in turn brought this action under 42

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[1] Tyrone, Inc. is the lessee of the theatre. Howard William Burtnett is its manager. For convenience the plaintiffs will be referred to as the theatre. Generally the defendants will be referred to as the Commonwealth's Attorney. The police also seized previews or fliers of another film.

[2] The prosecution was initiated under Virginia's obscenity statutes. Va. Code Ann. § 18.1-227 to -236.4 (1960). Three times previously Lee Art films have been seized and convictions obtained. The first conviction, based on a seizure in March 1966, was overturned by the United States Supreme Court in *Lee Art Theatre, Inc.* v. *Virginia*, 392 U.S. 636 (1968). Another conviction, based on an August 1966 seizure, was not appealed. And a third, which followed a seizure in October 1966, is on writ of error to the Supreme Court of Appeals of Virginia. In October 1966 the police also seized, but later returned, Lee Art's projection equipment.

U.S.C. § 1983, alleging violation of its First, Fourth, and Fourteenth Amendment rights. The sole claim is that the Constitution required an adversary hearing to determine obscenity before the film could be seized. The thrust of the complaint is that the seizure and the threat of its repetition will result in the suppression of nonobscene material. Not at issue, therefore, are the constitutionality of Virginia's obscenity statutes or the obscenity of "Angelique."

The district court granted an injunction which required the Commonwealth's Attorney to return the film and prohibited the seizure of any other until its obscenity had been determined in an adversary hearing. The court refused, however, to enjoin the prosecution of the theatre in state court. On appeal, the Commonwealth's Attorney attacks the injunction, and the theatre seeks to expand it to include a ban on the prosecution. We enforce the injunction as written, except that we will require the theatre to make available a copy of "Angelique" for the preparation and trial of the criminal cases. *Metzger* v. *Pearcy*, 393 F.2d 202, 204 (7th Cir. 1968).

I.

In *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964), the Court reversed an order for the destruction of books which had been seized on a search warrant issued by a judge who had made only an *ex parte* determination of obscenity. The books had been impounded and later condemned as obscene after an adversary hearing. In reversing, four Justices of the Supreme Court found the seizure constitutionally insufficient because there had been no adversary hearing on the issue of

obscenity before the books were confiscated.[3] This decision, we believe, is applicable to motion pictures. The First and Fourteenth Amendments protect the expression of ideas through movies, *Burstyn* v. *Wilson*, 343 U.S. 495 (1952), and the reasons for an adversary hearing before seizure apply as strongly to them as they do to books. The hearing, of course, is not designed to facilitate the display of obscene material, for public obscenity is not constitutionally protected. *Roth* v. *United States*, 354 U.S. 476, 485 (1957); see *Stanley* v. *Georgia*, 37 U.S.L.W. 4315, 4318 (U.S. April 7, 1969) (dictum). On the contrary, as the opinion of the Court in *A Quantity of Books* makes clear, the purpose of the hearing is to safeguard against governmental suppression of nonobscene expression. With movies, as with books, "the separation of legitimate from illegitimate speech calls for sensitive tools . . . ." *A Quantity of Books* v. *Kansas*, 378 U.S. 205, 212 (1964), quoting *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958).

We find support in *Metzger* v. *Pearcy*, 393 F.2d 202 (7th Cir. 1968), where the Seventh Circuit required a prior adversary hearing in a situation identical to ours in every significant way. The police lacked a search warrant there, but that provides no basis for distinguishing the case because the court focused on the lack of the hearing. *Metzger* included a re-

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[3]Mr. Justice Brennan wrote the opinion of the Court in which the Chief Justice, Mr. Justice White, and Mr. Justice Goldberg joined. Mr. Justice Black and Mr. Justice Douglas concurred because, on the basis of views they had previously expressed, the Kansas statute authorizing the destruction of the books violated the First and Fourteenth Amendments. Mr. Justice Stewart concurred on the ground that the books were not hard-core pornography. Mr. Justice Harlan and Mr. Justice Clark dissented because in their view Kansas could find the books obscene and seize them without an adversary hearing.

quirement, which we find reasonable and also adopt, that the theatre deliver to the Commonwealth's Attorney, upon request, a copy of the movie for reasonable use in the preparation and trial of the charges now pending in the state court.[4]

In holding that the Constitution requires an adversary hearing to determine obscenity before seizure of a movie, we do not imply that the hearing must be a fully matured action at law. Matters of comparable importance are often determined on an application for a preliminary injunction, after notice to the adverse party and an opportunity for him to be heard. Cf. *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957). An order to show cause why the film should not be seized as obscene presents another possibility. Va. Code Ann. § 18.1-236.3 (1960) *as amended* (Supp. 1968). But in whatever form, the proceedings must be "designed to focus searchingly on the question of obscenity." *Marcus* v. *Search Warrant,* 367 U.S. 717, 732 (1961).

II.

In assigning cross-error to the district judge's refusal to enjoin the state court prosecutions, the theatre urges that 28 U.S.C. § 2283 is not applicable.[5] This statute generally prohibits a federal court from staying proceedings in a state

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[4] We express, however, no opinion on the film's admissibility in evidence.

[5] 28 U.S.C. § 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

court. Nevertheless, the theatre argues, 42 U.S.C. § 1983[6] creates a statutory exception to § 2283 for the enforcement of First Amendent rights. We need not pursue this approach to the problem, for it is clear that the application for the injunction lacks equity.[7] Comity dictates denial of federal injunctive relief against state prosecutions that challenge First Amendment rights when it does not appear that the accused have "been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford [the accused] any protection which they could not secure by prompt trial and appeal pursued to this court." *Douglas* v. *City of Jeannette*, 319 U.S. 157, 164 (1943); cf. *Broyhill* v. *Morris*, ... F.2d .... (4th Cir. 1969). On the other hand, suppression of First Amendment rights by bad faith enforcement of a statute unconstitutional on its

[6] 42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

[7] The Supreme Court has expressly left open the question whether suits under 42 U.S.C. § 1983 constitute an exception to 28 U.S.C. § 2283. *Cameron* v. *Johnson*, 390 U.S. 611, 613,n.3 (1968); *Dombrowski* v. *Pfister*, 380 U.S. 479, 484, n.2 (1965). We have held that they do not. *Baines* v. *City of Danville*, 337 F.2d 579 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965). Accord, *Goss* v. *Illinois*, 312 F.2d 257 (7th Cir. 1963); *Sexton* v. *Barry*, 233 F.2d 220 (6th Cir. 1956). *Contra*, *Cooper* v. *Hutchinson*, 184 F.2d 119 (3d Cir. 1950); *Lansry* v. *Daley*, 288 F.Supp. 200 (N.D. Ill. 1968). See also, ALI Study of the Division of Jurisdiction between State and Federal Courts § 1372(7)(Tent. Draft No. 6, 1968)

face or as applied justifies immediate prohibition. Then the chilling effect on the full exercise of First Amendment freedoms results from the prosecution itself. Abatement need not await vindication in the criminal court. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); cf. *Zwickler* v. *Koota,* 389 U.S. 241 (1967). But here the theatre does not challenge either the con stitutionality or the application of Virginia statutes forbidding the exhibition of obscene movies. Additionally, the Commonwealth's Attorney, the district judge found, acted in good faith when he decided that under state and federal law the film could be seized for evidentiary purposes without a prior adversary hearing.

The theatre's attack upon this finding of good faith fails to establish that it is clearly erroneous. It has not been shown that the prosecutor sought to use the seizure as a covert device for suppression of the film by delaying trail. Nor has the earlier seizure of the projection equipment been repeated. More importantly, the Commonwealth's Attorney applied for a search warrant only after the magistrate had viewed the film. And he justifies this procedure by citing *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636 (1968), in which the same parties were involved. There the Court, in voiding a search warrant issued upon a single policeman's conclusion of obscenity, observed that it was unnecessary to decide "whether the justice of the peace should have viewed the motion picture before issuing the warrant." The Commonwealth's Attorney's interpretation of this remark cannot be equated with bad faith.

In sum, we have here good faith enforcement of an obscenity statute and no constitutional challenge to that statute. The district judge properly refused to enjoin the state court prosecutions. *Cameron* v. *Johnson,* 390 U.S. 611 (1968).

III.

The Commonwealth's Attorney argues that under 28 U.S.C. §2281 this case should have been heard by a three-judge district court.[8] The film was seized in accordance with Virginia statutes setting out procedures for the search and seizure of contraband, including obscene material. Va. Code Ann. § 19.1-83 to -87 (1960), *as amended*, (Supp. 1968). An attack on the constitutionality of the seizure must therefore, he urges, be an attack on the constitutionality of Virginia's search and seizure statutes. This is true, he says, even though the theatre in its complaint, and consistently thereafter, has carefully limited its attack to the specific seizure, without charging that any Virginia statute is unconstitutional.

We conclude, however, that a three-judge court was not required. The theatre does not contest the authority of the Commonwealth's Attorney to seize obscene films. It simply asserts that first there must be an adversary hearing to determine obscenity. Virginia's search and seizure statutes require the judge or justice issuing the warrant to be satisfied that there is reasonable cause for the search. Generally, reasonable cause can be established from an affidavit, but the judge need not accept the affidavit alone, and nothing in the statutes prohibits him from conducting an adversary hearing, as the Constitution requires.[9] When, as here, statutes would be con-

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[8] Title 28 U.S.C. § 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

stitutionally applied if administered properly, a single judge has jurisdiction. Cf. *Chester* v. *Kinnamon*, 276 F. Supp. 717 (D.Md. 1967).

In *Phillips* v. *United States*, 312 U.S. 246, 251 (1941), Mr. Justice Frankfurter, holding a three-judge court unnecessary in an analogous situation wrote:

> "The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases.
>
> "Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case in not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the congressional scheme of [28 U.S.C. § 2281]. It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law. In other words, it seeks a restraint not of a statute but of an executive action. But the enforcement of a 'statute,' within the meaning of [28 U.S.C. § 2281], is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness."

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[9] Virginia also has established procedures—not used here—to provide an adversary hearing before seizure of motion picture films. Va. Code Ann. § 18.1-236.3 (1960), as amended, Va. Code Ann. § 18.1-236.4 (Supp. 1968).

No. 13,192 is remanded to permit the district court to amend its injunction to make the film reasonably available to the Commonwealth's Attorney. In all other respects, the judgment is affirmed.

No. 13,193 is affirmed.

Appendix III

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TYRONE, INC., a Virginia Corporation
trading as Lee Art Theatre
and
HOWARD WILLIAM BURTNETT,
Plaintiffs

vs.

JAMES B. WILKINSON,
Commonwealth's Attorney for the City of Richmond, Virginia
and
FRANK S. DULING,
Chief of Police for the
City of Richmond, Virginia
Defendants

FILED

Nov. 21, 1969
Nov. 21, 1969

Clerk, U.S. Dist. Court
Richmond, Va.

Civil Action No. 6501-R

COMPLAINT

The plaintiffs, Tyrone, Inc. a Virginia corporation, and Howard William Burtnett, for their cause of action against the defendants, James B. Wilkinson, Commonwealth's Attorney for the City of Richmond, Virginia, and Frank S. Duling, Chief of Police for the City of Richmond Virginia, state as follows:

(1) The plaintiff is a corporation duly organized and existing under the laws of the State of Virginia, and it leaser the Lee Art Theatre at 934 West Grace Street, in the City of Richmond, Virginia, wherein it exhibits motion picture films; and the plaintiff, Howard William Burtnett, is a resident of the City of Richmond, Virginia, and is, and was, on October 21, 1968, manager of the said Lee Art Theatre.

(2) The individual defendants are citizens and residents of the City of Richmond in the State of Virginia, occupying the official positions as aforesaid.

(3) This Court has jurisdiction of the subject matter of this action under Title 42, USC, § 1983 and Title 28, § 1343(3) and 1343(4), because:

(a) This is an action to redress the deprivation under color of State law of rights, privileges or immunities secured to the plaintiffs by the Constitution of the United States;

(b) This is an action to secure equitable relief for the protection of the plaintiffs' civil rights;

(c) This is an action is redress the deprivation by the individual defendants to the plaintiffs' injury of their rights, privileges or immunities secured by the Constitution of the United States.

(4) On October 21, 1968, the plaintiff, Tyrone, Inc., was the licensee and entitled to possession of the prints of two motion picture films "Angelique Black Leather" and "Of The Same Gender", which said films were being exhibited at the Lee Art Theatre, 934 West Grace Street, Richmond, Virginia, in which theatre the defendant Howard William Burtnett, was employed as manager.

(5) Neither the State of Virginia nor the City of Richmond has any licensing or permit procedures relative to the sale, distribution or display of motion picture films.

(6) No adversary hearing procedure was initiated by either of the defendants prior to their acts hereinafter alleged.

(7) Notwithstanding the foregoing, on October 21, 1968 a search warrant was issued by one Andrew J. Winston, Justice of the Peace, alleging that affidavits had been filed pursuant to law and complaints were made to him by Edward W. Taylor, Reid A. Simmons, B. B. Marshall, Sergeant H. A Conner, J. Maklary and J. D. Owens that each of them had witnessed a movie at the Lee Art Theatre, 934 West Grace Street, and that they found the same to be:

"obscene without redeeming social value and it goes substantially beyond community standards in the display of nudity and sex and the dominant theme or purpose appeals to the prurient interest."

(A copy of said search warrant is attached hereto and made a part hereof as Exhibit 1.)

(8) That pursuant to the search warrant mentioned in the preceding paragraph, officers of the Richmond Police Department raided the said Lee Art Theatre at 934 West Grace Street during business hours and seized the motion picture entitled "Angelique Black Leather" and another entitled "Of the Same Gender" on the night of October 21, 1968, thereby causing the theatre to close for the remainder of the evening and resulting in the refunding by the manager of the price of admission to all of the patrons then in the theatre.

(9) On October 22, 1968, the said defendant, James B. Wilkinson, filed in the Hustings Court of the City of Richmond of Criminal Information against the plaintiff, Tyrone, Inc., trading as Lee Art Theatre, charging possession, showing and exhibiting in public a lewd and obscene motion picture, and a Criminal Information against the plaintiff, Howard William Burtnett, charging him with managing a theatre where an exhibition of an obscene motion picture was shown and displayed to the public. (Copies of said Criminal Informations are attached hereto and made a part hereof as Exhibits 2 and 3.)

(10) That pursuant to the filing of said Criminal Informations, a warrant for the arrest of the plaintiff, Howard William Burtnett, was issued on October 22, 1968, resulting in the arrest of the plaintiff, Howard William Burtnett, and requiring him to post a bond of $500.00 to obtain his release.

(11) The arrest of the plaintiff, Howard William Burtnett, and the seizure of the motion pictures aforesaid were made

at the direction of and with the consent and approval of defendants James B. Wilkinson, Commonwealth's Attorney for the City of Richmond, and Frank S. Duling, Chief of Police for the City of Richmond.

(12) No adversary determination of whether the films were obscene was made prior to such seizure; no adversary hearing in its regard was offered to the plaintiffs prior to such seizure; and the plaintiffs understand that the affiants named in the search warrant viewed the motion pictures involved as patrons of the Lee Art Theatre and then retired to the office of said Andrew J. Winston, Justice of the Peace, filed their affidavits resulting in the issuance of the search warrant as aforesaid.

(13) Counsel for the plaintiffs have requested the return of the motion picture prints, which request has been refused.

(14) The seizure of any further prints of film will materially and adversely affect the Constitutional rights of plaintiffs by inhibiting dissemination of motion pictures that have not been declared to be obscene or otherwise in violation of law by any judicial or administrative body pursuant to an adversary hearing and will result in the theatre owner being intimidated from scheduling films for bookings or into cancelling bookings already schedule and would further restrict the public right to view motion picture films.

(15) Any further seizures, or threats of seizure, or other repression, would be a violation of the plaintiff's rights under the First, Fourth and Fourteenth Amendments of the Constitution of the United States and § 1983 of the Civil Rights Act of 1964, and would do the plaintiffs irreparable damage.

(16) The prints of the films which were seized by the defendants on the night of October 21, 1968, are now in the possession of defendants at Richmond, Virginia.

(17) That on several previous occasions, at the direction of the defendant, James B. Wilkinson, Commonwealth's Attorney for the City of Richmond, the said Lee Art Theatre at 934 West Grace Street, Richmond, Virginia, was raided by officers of the Richmond Police Department resulting in: (a) The wanton damage and removal of a valuable motion picture projector which damage and removal was clearly unrelated to any legitimate purpose of the Commonwealth and was intended solely to inflict damage, injury and punishment to the theatre owners prior to any judicial hearing or determination; and to inhibit and intimidate said owners in the conduct of their business, as aforesaid; and (b) in seizures of motion picture films which were then and there being exhibited to an audience in the Lee Art Theatre, which films had not been determined to be obscene; and the defendants then and there unlawfully caused to be taken and carried away property of the Lee Art Theatre, which the Lee Art Theatre was licensed to exhibit, and converted said films to their own use; that said prints were then and there each of the value of $500.00 or more, as a print. That demand has been made upon the defendants for the return of the motion picture prints aforesaid, which demand has been refused by the defendants.

(18) That the acts of the defendants as aforesaid were motivated out of a desire to injure the business of the plaintiff, Tyrone, Inc., with the avowed purpose to prohibit the exhibition of films which the plaintiff, Tyrone, Inc., was licensed to exhibit, thereby depriving the plaintiff of all the gains and profits it would have derived from the exhibition of

the said films at the said Lee Art Theatre. That because of the nature of the actions herein complained of, it is essential to the preservation of the plaintiff's (Tyrone, Inc.) business and property and its reputation that it be protected against such further continued acts by the defendants.

(19) That the actions of the said James B. Wilkinson, Commonwealth's Attorney for the City of Richmond, and the said Frank S. Duling, acting by and through his subordinates in seizing the films in question pursuant to a search warrant, raise the Constitutional issues of whether state officers can Constitutionally seize prints of allegedly obscene moving pictures without prior adversary hearing on the issue of obscenity and whether officers can seize and retain films as evidence in a pending obscenity prosecution as has been done in this instance.

(20) All of the acts hereinbefore complained of were carried out by defendants with prior design and intent in that the defendant, James B. Wilkinson, had announced to plaintiff's counsel, subsequent to the earlier seizures referred to in paragraph (17) above and prior to the latter seizures on October 21, 1968, that if further films were shown in the plaintiff's theatre which would, in his opinion, be obscene, then same would be confiscated and those responsible for the exhibition thereof arrested; and, accordingly, the plaintiffs are without adequate remedy for the protection of their civil and Constitutional rights save in this honorable Court.

WHEREFORE, the plaintiffs ask this Court:

(1) To issue its Order, temporarily restraining the defendants, their agents and employees, and subordinates, and all persons in active concert or participating with them, or

any of them, from sezing any prints of the films aforesaid or threatening to do so, or otherwise interfering with the exhibition of any films exhibited by plaintiffs prior to a determination of obscenity in an adversary proceeding.

(2) Issue its Order requiring the defendants, or their subordinates, to return the prints of the motion picture films seized as hereinbefore alleged.

(3) Issue its Order, setting a prompt hearing wherein defendants shall show cause why they and those in active concert or participation with them, or any of them, should not be enjoined, during the pendency of this action, from making any such seizures, threats or interference with regard to any films exhibited by plaintiffs.

(4) Issue its Order consolidating the aforesaid hearing with the trial for permanent injunctive relief, and after such trial, permanently enjoining the defendants, and those in active concert with them or any of them, from such aforesaid seizures or interferences.

(5) Issue its Order temporarily restraining and permanently enjoining the defendants and their subordinates from the further prosecution of the plaintiffs pursuant to the Criminal Informations filed by the defendant James B. Wilkinson in the Hustings Court of the City of Richmond described in numbered paragraph 9 hereof.

(6) To grant plaintiffs such other relief as may be just and proper in the circumstances.

TYRONE, INC., AND
HOWARD WILLIAM BURTNETT

By S/ Joseph S. Bambacus

Counsel

Heberle and Bambacus
418 Mutual Building
Richmond, Virginia

By S/ Joseph S. Bambacus
Joseph S. Bambacus

STATE OF VIRGINIA
CITY OF RICHMOND, to-wit:

Joseph S. Bambacus, being first duly sworn, on oath deposes and says that he is Attorney for Tyrone, Inc., and Howard William Burtnett, that he has read the above Complaint, that he understands the same, and that the statements therein contained are true to the best of his information, knowledge and belief.

S/ Joseph S. Bambacus

Subscribed and sworn to before me this 18th day of November, 1968.

S/ Effie P. Davis
Notary Public

Appendix IV

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TYRONE, INC., A Virginia Corporation
trading as Lee Art Theatre
and
HOWARD WILLIAM BURTNETT,
Plaintiffs

v. Civil Action No. 6051-R

JAMES B. WILKINSON,
Commonwealth's Attorney for the
City of Richmond, Virginia
and
FRANK S. DULING,
Chief of Police for the
City of Richmond, Virginia.
Defendants

MOTION TO DISMISS

James B. Wilkinson, Attorney for the Commonwealth for the City of Richmond and Frank S. Duling, Chief of Police for the City of Richmond, Virginia, hereby moves the Court to dismiss the complaint filed against them as it does not assert sufficient acts to give this Court jurisdiction in that the plaintiff do not raise the constitutionality of any Virginia Statute. If the constitutionality of a State statute is raised then only a three judge Federal court can rule the same unconstitutional and the defendant has not requested that a three judge Federal court be convened.

The plaintiffs did not allege bad faith on part of the State officials in arresting the plaintiffs, therefore, this Court is without actual jurisdiction to enjoin the enforcement of a valid State law under our system of federalism.

FRANK S. DULING,
Chief of Police of the City of Richmond,

and

JAMES B. WILKINSON,
Attorney for the Commonwealth for the
City of Richmond

By S/ James B. Wilkinson
James B. Wilkinson

CERTIFICATE

I, James B. Wilkinson, certify that a copy of this Motion to Dismiss was mailed to Joseph S. Bambacus, Attorney at Law, Mutual Building, Room 418, 9th and Main Streets, Richmond, Virginia 23219, on December 12, 1968.

S/ James B. Wilkinson

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TYRONE, INC., A Virginia corporation,
trading as Lee Art Theatre
and
HOWARD WILLIAM BURTNETT,

Plaintiffs

v. Civil Action No. 6051-R

JAMES B. WILKINSON,
Commonwealth's Attorney for the
City of Richmond, Virginia
and
FRANK S. DULING,
Chief of Police for the
City of Richmond, Virginia

Defendants

ANSWER

The defendants, Frank S. Duling, Chief of Police of the City of Richmond, Virginia, and James B. Wilkinson, Attorney for the Commonwealth for the City of Richmond, Virginia, in response to the complaint filed against them answer and say as follows:

(a.) The defendants admit paragraphs 1 and 2 of the complaint filed against them:

(b.) The defendants deny that this Honorable Court has jurisdiction of the subject matter as alleged by the plaintiffs in the complaint.

(c.) The defendants admit that "Angelique In Black Leather" was being exhibited at the Lee Art Theatre on October 21, 1968, but deny that the film "Of The Same Gender" was exhibited in said theatre on the aforesaid date but only the previews of said film were exhibited.

(d.) The defendants admit the allegations of paragraphs 5 and 6 in said complaint.

(e.) The defendants admit that a search warrant was executed on said theatre on October 21, 1968, after affidavits had been filed according to law by Edward W. Taylor, Attorney at Law, Reid A. Simmons, Assistant Commonwealth's Attorney of the City of Richmond, Officers B. B. Marshall, J. Maklary, J. D. Owens and Sergeant H. A. Conner, which affidavits set forth sufficient and ample evidence for the issuance of a search warrant as aforementioned. That prior to the issuance of the search warrant the movie "Angelique In Black Leather" was viewed by Andrew J. Winston, Magistrate of the City of Richmond, Virginia.

(f.) The defendants admit that pursuant to the search warrant the motion picture entitled "Angelique In Black Leather" was seized according to law but they deny that the film "Of The Same Gender" was seized at same theatre. The defendants admit that they seize the previews "Of The Same Gender" at 3408 Floyd Avenue, the residence of the plaintiff, Howard William Burtnett; that the previews were only seized after a valid search warrant was issued and the officers were informed by the plaintiff, Howard William Burtnett the said previews had been removed from said theatre and were at this residence. The defendants cannot answer whether or not said theatre closed for the remainder of the evening of October 21, 1968, and that refunds to the customers were made by the manager to the patrons then in the theatre.

(g.) The defendants admit the allegations of complaint as contained in paragraphs 9, 10, 11, 12 and 13 of the complaint.

(h.) The defendants deny emphatically that they have materially and adversary affected the Constitutional rights of the plaintiffs by inhibiting dissemination of motion pictures, as obscenity has never been protected under the First Amendment of the Constitution of the United States; they further deny that the plaintiffs have been in any way intimidated from scheduling films or cancelling bookings already scheduled; they have in no way restricted the public's right to view any motion picture that is not obscene.

The defendants deny that the seizure of said movie "Angelique In Black Leather" has restricted the Constitutional rights of the plaintiffs in any way and that the plaintiffs would suffer irreparable damage, but to the contrary, the defendants in their official capacity have acted lawfully and reasonably

in the discharge of their Constitutional duty to enforce the criminal laws of the Commonwealth of Virginia.

The defendants admit that the prints of the film are now in the possession of the City Sergeant of the City of Richmond being held as evidence for the prosecution of the *Commonwealth of Virginia* vs. *Tyrone, Inc. and Howard William Burnett.*

(i.) The defendants admit that on prior occasions films have been seized at the Lee Art Theatre pursuant to search warrants but they emphatically deny that any wanton damage was done to said theatre; they further admit that on one seizure a motion picture projector was removed but not wantonly damaged and that said projector was seized pursuant to a search warrant; the said projector was returned to the plaintiff, Tyrone, Inc., that it has never been the intention or desire of the defendants to inflict any unlawful damage, injury or punishment to the plaintiff nor to intimidate or inhibit the plaintiff in the conduct of their business so long as said business did not violate the laws of the Commonwealth of Virginia; the defendants deny the allegations in 17b of the complaint because of all the prior film seized pursuant to a search warrant all but one had been declared to be obscene by either a jury or judge after the criminal hearing in the Hustings Court of the City of Richmond. To date no court has ever held that the films previously seized, except the one returned to the plaintiff voluntarily, were not obscene; that the first case of the *Commonwealth of Virginia* vs. *Lee Art Theatre, Inc.* was reversed by the United States Supreme Court because of the technicality in the search warrant but even that Court never held that the films themselves were not obscene. In the first case a jury composed of citizens of this jurisdiction found both films, "The Erotic Touch of Hot Skin"

and "Rent A Girl", to be obscene and their findings were approved by the Honorable Samuel B. Witt, Jr., Judge of the Hustings Court of the City of Richmond, and the Supreme Court of Appeals of Virginia refused a writ of error, which in effect, approved the vedict of the jury and trial court. The United States Supreme Court did not say the movies in question were not obscene but only that the search warrant was defective.

That the defendants emphatically deny that they unlawfully caused to be taken and carried away any property of the Lee Art Theatre and converted said property to their own use. That the films so seized were only used in preparation and trial of the criminal prosecutions.

(j.) The defendants deny that the seizures were motivated out of a desire to injure the business of Tyrone, Inc. and they had no purpose to prohibit the exhibition of films that Tyrone, Inc. was licensed to exhibit nor did they have any desire to deprive the plaintiff, Tyrone, Inc., of any gain of profits that it was entitled. The only desire of the defendants in this instance is to enforce the criminal laws of the Commonwealth of Virginia.

The defendants deny that the seizure of the film "Angelique In Black Leather" raises any Constitutional issue which this Court has jurisdiction to decide at this stage of the case.

The defendant, James B. Wilkinson, denies announcing to the plaintiff's counsel that if any further films were shown in the plaintiff's theatre, which in his opinion would be obscene, then same would be confiscated and those responsible for the exhibition thereof be arrested. That the only representation made by the defendant, James B. Wilkinson, to

the plaintiff's counsel, Joseph S. Bambacus, is that the criminal laws of the Commonwealth of Virginia would be enforced against the Lee Art Theatre or any other persons that violate the same. That by the complaint filed by the plaintiffs it is clearly shown that paragraph 20 of the complaint is erroneous, and without evidence to support it in that the plaintiffs in their complaint state that Edward W. Taylor, Reid A. Simmons, B. B. Marshall, H. A. Conner, J. Maklary and J. D. Owens filed affidavits with Andrew J. Winston and said Winston observed the motion picture "Angelique In Black Leather" before a search warrant was issued. The said defendant, James B. Wilkinson, never observed the motion picture "Angelique In Black Leather" until after it was seized under a lawful and valid search warrant.

(k.) That the plaintiffs in their petition have not raised nor do they question the constitutionality of the Virginia obscenity or search warrant statutes, therefore, this Court is without jurisdiction to determine the issues raised by the complaint.

The defendant requests that the relief sought by the plaintiff be denied and the defendants be dismissed with their costs.

/s/_____
James B. Wilkinson

/s/_____
Frank S. Duling

STATE OF VIRGINIA
CITY OF RICHMOND, to-wit:

Frank S. Duling and James B. Wilkinson being first duly sworn state that they are the Chief of Police of the City of Richmond and the Attorney for the Commonwealth for the City of Richmond, respectively, that they read the above answer and they understand the same and that the statements therein contained are true to the best of their information, knowledge and belief

/s/_____
James B. Wilkinson
Attorney For the Commonwealth for
the City of Richmond

Frank S. Duling
Chief of Police for
the City of Richmond

Subscribed and sworn to before me this _____ day of December, 1968.

My commission expires _____

_____
Notary Public

APPENDIX V

AFFIDAVIT FOR SEARCH WARRANT

Commonwealth of Virginia,
City of Richmond, to-wit:

AFFIDAVIT FOR SEARCH WARRANT

Before me, Andrew J. Winston, a NOTARY PUBLIC of the City aforesaid, this day appeared Sgt. H. A. Conner and made oath as follows:

(1) Substantially the offense in relation to which search is to be made.

Obscene movie titled "Anselique in Black Leather" playing to the public at Lee Art Theatre, 934 W. Grace Street, I personally have seen.

(2) The material facts constituting probable cause for issuance of the warrant.

(a) I personally observed the movie titled "Anselique" at the Lee Art Theatre, 934 W. Grace Street on October 19, 1968.

(b) The movie "Anselique" is without any redeeming social value and it goes substantially beyond community standards in the display of nudity and sex and the dominant theme or purpose appeals to the prurient interest.

(c) Complaints from citizens complaining that the movie "Anselique" is obscene.

(d) I personally observed women completely nude (Including the showing of the hair in the pubic area) making love to each other, kissing each other, kissing the breast, and fondling the buttocks of each other and fondling the lower part of the belly near the pubic area. There was also a scene of a 8mm film being shown to one of the women in the movie where a man and women partly undressed were making loving and fondling each other, the man had his hand inside the women panties and you could see him rubbing the pubic area.

(3) What is to be searched for under the warrant.
Movie film titled "Anselique" now playing at the Lee Art Theatre, 934 West Grace Street, Richmond, Va.

(4) The Movie Theatre: Lee Art Theatre to be searched.
934 West Grace Street
Richmond, Va.

H. A. Conner
Affiant

Subscribed and sworn to before me this 21 day of October, 1968.

Andrew J. Winston
NOTARY PUBLIC

My Commission Expires
7/29/69

Commonwealth of Virginia,
City of Richmond, to-wit:

AFFIDAVIT FOR SEARCH WARRANT

Before me, Andrew J. Winston, a NOTARY PUBLIC of the City aforesaid, this day appeared J. D. Owens and made oath as follows:

(1) Substantially the offense in relation to which search is to be made.

Obscene movie titled "Anselique" playing to the public at the Lee Art Theatre, 934 West Grace Street, that I have personally viewed.

(2) The material facts constituting probable cause for issuance of the warrant

(a) I personally viewed the movie titled "Anselique" at the Lee Art Theatre on October 19, 1968.

(b) The movie "Anselique" is without any redeeming social value and it goes substantially beyond community standards in the display of nudity and sex and the dominant theme or purpose appeals to the prurient interest.

(c) Complaints from citizens complaining that the movie "Anselique" being obscene.

(d) I personally observed women fondling each other on the buttock (nude), kissing each other on the naked breast, and fondling each other over the entire nude body. Several of the scenes during the lovemaking the nude body was shown including the pubic hair

(3) What is to be searched for under the warrant.
Movie film titled "Anselique" now playing at the Lee Art Theatre, 934 West Grace Street. Richmond, Virginia.

(4) The Movie Theatre: Lee Art Theatre to be searched.
934 West Grace Street
Richmond, Va.

J. D. Owens
Affiant

Subscribed and sworn to before me this 21 day of October, 1968.

/s/ Andrew J. Winston
NOTARY PUBLIC

My Commission Expires
7/29/69

Commonwealth of Virginia,
City of Richmond, to-wit:

AFFIDAVIT FOR SEARCH WARRANT

Before me, Andrew J. Winston, a NOTARY PUBLIC of the City aforesaid, this day appeared J. Maklary and made oath as follows:

(1) Substantially the offense in relation to which search is to be made.
Obscene movie titled "Anselique" playing to the public at the Lee Art Theatre, 934 W. Grace St. which the above person has personally seen.

(2) The material facts constituting probable cause for issuance of the warrant.

(a) The movie Anselique is without any redeeming social value and it goes substantiality beyond the community standards in the display of nudity and sex and the dominant theme or purpose, appeals to the prurient interest.

(b) I personally observed the movie titled "Anselique" at the Lee Art Theatre, 934 W. Grace St. on October 19th, 1968.

(c) I have received complaints from citizens stating that the movie, Anselique was obscene.

(d) In my opinion there are many scenes in this movie that are obscene such as, women that are completely nude including the pubic hair on the women. Women kissing other women's breast, fondling of women's breast by other women, also scenes of a man fondling a woman's body. There was also a scene of a woman rubbing a candle in a perverse manner as she was placing the candle on the woman's breast, stomach, and also placing it in the woman's navel.

(3) What is to be searched for under the warrant. Movie film titled "Anselique in Black Leather", now playing at the Lee Art Theatre, 934 West Grace Street.

(4) The Lee Art Theatre to be searched.

Movie Theatre 934 West Grace Street
934 West Grace Street
Richmond, Va.

J. Maklary
Affiant

Subscribed and sworn to before me this 21st day of October, 1968

Andrew J. Winston
NOTARY PUBLIC

My Commission Expires
7/29/69

Commonwealth of Virginia,
City of Richmond, to-wit:

AFFIDAVIT FOR SEARCH WARRANT

Before me, Andrew J. Winston, a NOTARY PUBLIC of the City aforesaid, this day appeared B. B. Marshall and made oath as follows:

(1) Substantially the offense in relation to which search is to be made.
Obscene movie titled "Anselique" playing to the public at the Lee Art Theatre, 934 W. Grace Street, I personally have seen.

(2) The material facts constituting probable cause for issuance of the warrant.

(a) I personally observed the movie titled "Anselique' at the Lee Art Theatre, 934 W. Grace Street on October 21, 1968

(b) The movie "Anselique" is without any redeeming social value and it goes substantially beyond com munity standards in the display of nudity and sex and the dominant theme of purpose appeals to the prurient interest.

(c) I personally observed women completely nude (Including the showing of the hair in the pubic area) making love to each other, kissing each other, kissing the breast, and fondling the buttock of each other and fondling the lower part of the belly near the pubic area.

(3) What is to be searched for under the warrant.
Movie film titled "Anselique" now playing at the Lee Art Theatre, 934 West Grace Street.

(4) The Movie Theatre: Lee Art Theatre to be searched.

934 West Grace Street

B. B. Marshall
Affiant

Subscribed and sworn to before me this 21 day of October, 1968.

Andrew J. Winston
NOTARY PUBLIC

My Commission Expires
7/29/69

Before me, Andrew J. Winston, a NOTARY PUBLIC of the City aforesaid, this day appeared Edward W. Taylor and made oath as follows:

(1) Substantially the offense in relation to which search is to be made.
Obscene movie entitled "Anselique in Black Leather" playing this date at the Lee Art Theatre, 934 West Grace Street, Richmond, Virginia which I have personally viewed.

(2) The material facts constituting probable cause for issuance of the warrant.

(1) I personally viewed "Anselique in Black Leather" playing at the Lee Art Theatre on Oct. 21, 1968.

(2) This movie is utterly without any redeeming social value because it is entirely about two lesbians making love to one another and with other lesbians. The movie shows both women kissing and embracing one

another in the nude and fondling each other's breasts. It shows one woman kissing the breast of the other as if a suckling child.

(3) The movie further depicts women in complete nudity at times disclosing the hair in the pubic area. I find no redeeming social value in this movie.

(3) What is to be searched for under the warrant. Movie film entitled "Anselique in Black Leather" playing at the Lee Art Theatre, 934 West Grace Street, Richmond, Virginia.

(4) The Movie Theatre: Lee Art Theatre to be searched.
934 West Grace Street
City of Richmond, Virginia

Edward W. Taylor
Affiant

Subscribed and sworn to before me this 21st day of October 1968

Andrew J. Winston
NOTARY PUBLIC
My Commission Expires
7/29/69

AFFIDAVIT FOR SEARCH WARRANT

Commonwealth of Virginia,
City of Richmond, to-wit:

Before me, Andrew J. Winston, a NOTARY PUBLIC of the City aforesaid, this day appeared Reid A. Simmons and made oath as follows:

(1) Substantially the offense in relation to which search is to be made.
Obscene movie titled "Anselique in Black Leather" playing at Lee Art Theatre and open to the public at 934 W. Grace Street. Which the above person has personally seen.

(2) The material facts constituting probable cause for issuance of the warrant.

(a) I personally viewed the movie "Anselique in Black Leather" at the Lee Art Theatre located at 934 W. Grace Street, Richmond, Virginia on October 21, 1968.

(b) The movie "Anselique in Black Leather" is without any redeeming social value and the movies dominant theme of pupose of nudity and sex goes beyond the community standards and appeals to the prurient interest.

(c) The movie "Anselique in Black Leather" has many obscene scenes of lesbians completely nude kissing each others breasts and fondling in the pubic area. The public area was on several occasions completely visible to the audience. There was also a scene of a man fondling womans body.

(3) What is to be searched for under the warrant.
Movie film entitled "Anselique in Black Leather" playing at the Lee Art Theatre, 934 W. Grace Street, Richmond, Virginia on October 21, 1968.

(4) The Lee Art Theatre to be searched.
934 West Grace Street
Richmond, Virginia

Reid A. Simmons
Affiant

Subscribed and sworn to before me this 21st day of October 1968.

Original of Affidavit of Search Warrant
Filed in
Chancery Court October 23, 1968
E. E. Warriner, Clerk

Andrew J. Winston
NOTARY PUBLIC
My Commission Expires
7/29/69

AUG 1 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

No. 418

TYRONE, INC., A VIRGINIA CORPORATION, TRADING AS LEE ART THEATRE, AND HOWARD WILLIAM BURTNETT,
Petitioners,

v.

JAMES B. WILKINSON, COMMONWEALTH'S ATTORNEY FOR THE CITY OF RICHMOND, VIRGINIA, AND FRANK S. DULING, CHIEF OF POLICE FOR THE CITY OF RICHMOND, VIRGINIA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSEPH S. BAMBACUS
T. WILSON HOTZE, JR.
418 Mutual Building
Richmond, Virginia
Counsel for Petitioners

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Supreme Court of the United States

No. .....

TYRONE, INC., A VIRGINIA CORPORATION, TRADING AS LEE ART THEATRE, AND HOWARD WILLIAM BURTNETT,

Petitioners,

v.

JAMES B. WILKINSON, COMMONWEALTH'S ATTORNEY FOR THE CITY OF RICHMOND, VIRGINIA, AND FRANK S. DULING, CHIEF OF POLICE FOR THE CITY OF RICHMOND, VIRGINIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment of the United States District Court for the Eastern District of Virginia, with the exception that the relief obtained by the petitioners was further restricted.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Virginia is reported in 294 F. Supp. 1330. The opinion of the Court of Appeals for the Fourth Circuit has not yet been officially reported. Both opinions are annexed hereto as an Appendix (Appendix 1a-24a, *infra*).

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1969 (Appendix 12a). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Does the seizure of motion picture films in violation of the First Amendment, together with the other facts of this case, entitle the petitioners to equitable relief from state court prosecution based on said seizures?

II. Did the United States Court of Appeals for the Fourth Circuit err when it imposed on petitioners the requirements of making available to the State copies of illegally seized films for use in the state court prosecution against the petitioners?

STATUTES INVOLVED

Title 42, United States Code: § 1983

> "Every person who, under color of any statute, ordinance, regulation, custody, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress."

Title 28, United States Code: § 2283

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

STATEMENT

On the night of October 21, 1968, the motion picture film, "Angelique in Black Leather," and the previews of another film, "Of the Same Gender," were seized by Richmond police officers acting at the direction of the defendants, the Commonwealth's Attorney and the Chief of Police for the City of Richmond, Virginia. Prior to the seizure, which occurred during the business hours of the petitioners' theatre, the police officers had obtained a search warrant which had commanded them to enter the theatre operated by the petitioners at 934 West Grace Street, Richmond, Virginia, and there seize the said "obscene films."

Prior to the interruption of the petitioners' business operations by the seizure on the evening of October 21, 1968, there had been no adversary determination of the obscenity of the films and prints in question. No adversary hearing on the question of alleged obscenity had been afforded the owner of the film, or the exhibitor, Tyrone, Inc., or its theatre manager, the petitioner, Burtnett. The seizures were without the consent of the petitioners and without any notice to them in advance.

Following seizure of the films, Criminal Informations were returned in the state court charging the petitioner, Tyrone, Inc., with the possession and exhibition of a lewd and obscene motion picture and charging Howard William Burtnett with managing a theatre where an obscene motion

picture was shown and displayed to the public. The criminal cases against the petitioners are now pending and awaiting trial in the Hustings Court of the City of Richmond. The films and prints in question have remained in the possession of the defendants.

The petitioners initiated this case by bringing an action under 42 U.S.C. sec. 1983, the Civil Rights Act, alleging a violation of their rights under the First, Fourth, and Fourteenth Amendments and praying for equitable relief from the seizures. The petitioners seek an injunction against the pending and any future prosecutions on obscenity charges, where seizures of motion picture films are made without a prior adversary hearing on the question of obscenity. The thrust of the complaint was that the seizures materially and adversely affected the Constitutional rights of the petitioners by inhibiting dissemination of presumably protected motion pictures that had not been declared to be obscene or in violation of any law. It was alleged that the seizures and the threats of seizures amounted to repression of protected freedoms, and that the facts of the case demonstrated irreparable damage and injury.

The evidence in support of the petitioners' case in the District Court established an unequivocal pattern of past conduct on the part of law enforcement officials in the City of Richmond. There had been three prior raids on the theatre resulting in the seizures of films. The first raid occurred in March, 1966, which resulted in a conviction which was overturned later by the United States Supreme Court in *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636 (1968). The second raid occurred in August, 1966, and resulted in a conviction which was not appealed. In October, 1966, another raid and seizure resulted in a conviction which is now on appeal in the Supreme Court of Appeals of

Virginia. In each case police officers raided the petitioners' theatre after securing search warrants and after consultation with the defendant, Wilkinson. One of these occasions, October 26, 1966, two 35 millimeter movie projectors were seized. On the same occasion police officers damaged machinery and equipment belonging to the corporate petitioner, including the cutting of cables and the electrical wiring to the motion picture projectors, thereby forcing the corporate petitioner to spend in excess of $1,500.00 for repairs. This damage was unrelated to any legitimate state purpose.

The defendant, Mr. Wilkinson, testified in the District Court. He admitted that the seizures of all films in 1966 and in 1968 were accomplished in the absence of a prior adversary hearing on the question of obscenity. He defended the seizure of the projectors on the theory that they were instrumentalities used in the commission of a crime. He stated that the seizures would be repeated in the future, and that he did not intend to afford a prior adversary hearing until he was ordered to do so by some authority of competent jurisdiction. He stated that he was familiar with the decision of the United States Supreme Court in *A Quantity of Books* v. *Kansas*, 378 U.S. 205, at the time of all the aforesaid seizures, but stated that he did not feel bound by that decision.

The United States District Court for the Eastern District of Virginia in 294 F. Supp. 1330 ordered a return of all motion picture films seized by the defendants and permanently enjoined the defendants from seizing allegedly obscene motion picture films without first affording petitioners a prior adversary hearing. The District Court refused to enjoin the pending criminal prosecutions on obscenity charges in the state court. (Appendix 1a)

The United States Court of Appeals for the Fourth Circuit affirmed the District Court, in an opinion which is not officially reported yet, except that it imposed on the theatre the obligation to make copies of the films available for the preparation and trial of the criminal cases (Appendix 12a)

REASONS FOR GRANTING THE WRIT

The seizures of the films in question and the related criminal prosecutions, having been commenced without first affording the petitioners a prior adversary hearing on the question of obscenity, are in clear violation of the Constitution. *A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1965) the leading case on the Constitutional requirement of an adversary hearing prior to seizure, has been followed universally by the federal courts. See *Freedman* v. *Maryland,* 380 U.S. 51, 132 Ed. 2d 649; *Metzger* v. *Pearcy,* 393 F.2d 202; *United States* v. *18 Packages of Magazines,* 238 F. Supp. 846; *Cambist Films* v. *Illinois,* 292 F. Supp. 185; *United States* v. *Brown,* 274 F.Supp. 561.

The purpose of the procedural requirement of an adversary hearing is to safeguard against governmental suppression of expression. Despite the acknowledged necessity for caution in the area of First Amendment freedoms, the defendants in this case brazenly ignore the rule requiring an adversary hearing prior to seizure and publicly announce their intention to continue to ignore the rule.

On these facts the District Court found that there was no bad faith enforcement of the Virginia obscenity statutes on the part of law enforcement officials (Appendix 10a). It is submitted that the test of what constitutes bad faith enforcement of state law must be an objective one. More than the sincerity of the Commonwealth's Attorney is involved when he says that he does not feel bound by the decisions

of this Court. The application of an objective principle of law should not depend on a subjective state of mind. The prosecutor's motives are far less important than what the objective facts reveal. Those facts show an unequivocal course of conduct by the defendants in raiding the theater's premises and seizing its films. The seizure of motion picture projectors and the wilful damage to the property belonging to the theater, admitted acts in this case, and wholly unrelated to any legitimate purpose the State may have in its prosecution, prove the petitioners' claim of bad faith enforcement.

In *Dombrowski* v. *Pfister,* 380 U.S. 479 (1967) this Court held that bad faith enforcement of state law constituted a ground for federal equitable relief from state court criminal proceedings. We recognize that *Dombrowski* also involved the unconstitutionality of broad statutes regulating freedom of expression, but the holding of *Dombrowski* is that either bad faith enforcement of state law or the unconstitutionality of statutes regulating freedom of expression justifies federal injunctive relief from state criminal prosecution.

The following language from the opinion of the Court in *Dombrowski* is relevant.

> "We hold that abstention doctrine is inappropriate for cases such as the present one where, unlike *Douglas* v. *City of Jeannette,* statutes are justifiably attacked on their face as abridging free expression *or as applied for the purpose of discouraging protected activities.* 380 U.S. 489-490, 85 S.Ct. 1122 (Emphasis added).

The use of the disjunctive phrase clearly indicates that the two exceptions were recognized by the Court.

Later decisions of this Court and lower federal courts have recognized that bad faith enforcement of state statutes

is an independent ground for federal equitable relief from state court prosecutions. *Cameron* v. *Johnson,* 381 U.S. 747 (1967); *Cameron* v. *Johnson,* 390 U.S. 611 (1968); *Carmichael* v. *Allen,* 267 F.Supp. 985 (N.D. Gov. 1967); *Ware* v. *Nuchols,* 266 F.Supp. 564 (N.D. Miss. 1967); *Cambist Films* v. *Illinois,* 292 F.Supp. 185 (N.D. Ill. 1968); *Landry* v. *Daley,* 288 F.Supp. 200 (N.D. Ill. 1968).

It is obvious that the *Dombrowski* decision rests on the unstated assumption that in a free and democratic society the full exercise of First Amendment freedoms should not be substantially impaired but should be actively encouraged. The "chill" on expression resulting from bad faith prosecution or prosecution undertaken in violation of the First Amendment involves more harm or injury than "that incidental to every criminal proceeding brought lawfully and in good faith." As this Court has stated "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser."

It is clear that the prosecution in the case at bar has been undertaken in violation of the First Amendment. If this is true because the procedures render unconstitutional the application of state law to the petitioners, then the conduct depicted amounts to the necessary "special circumstances" for full and complete equitable relief from the pending state court prosecutions. This is indeed the rationale of the *Dombrowski* and the *Cameron* decisions that has been reached by this Court without consideration of the applicability of the anti-injunction statute, 28 U.S.C. § 2283. Thus, this Court has sanctioned full equitable relief without formal discussion of § 2283. The petitioners therefore submit that on the basis of existing case law they are entitled to full equitable relief, including a stay of the pending state court prosecutions.

There is a conflict among the Circuits as to whether or not the Civil Rights Act, 42 U.S.C. § 1983 creates any exception to the general prohibition of § 2283 of the Judiciary Act. The Court of Appeals for the Third Circuit, in *Cooper* v. *Hutchinson,* 184 F.2d 119, held that § 1983 constituted an express authorization for the granting of an injunction against state court proceedings within the meaning of § 2283. See also *Tribune Review Publishing Co.* v. *Thomas,* 153 F.Supp. 486 (W.D. Pa. 1957); *Hullett* v. *Julian,* 250 F.Supp. 208 (M.D. Ala. 1966). On the contrary, *Goss* v. *Illinois,* 312 F.2d 257 (7th Cir. 1963); *Sexton* v. *Barry,* 233 F.2d 220 (6th Cir. 1956) and *Baines* v. *City of Danville,* 337 F.2d 579 (4th Cir. 1964) hold that the Civil Rights Act does not create an express exception to the anti-injunction statute. Clearly, the Courts of Appeals are in conflict on the same issue and an important question of federal law should be settled by this Court.

The exhaustive opinion in *Landry* v. *Daley, supra* (1968) contains a cogent analysis of the issue, including an attack on the Fourth Circuit opinion in *Baines* v. *City of Danville, supra.* The historical background of the anti-injunction statute is traced back to the Congress of 1793. The Civil Rights Act is traced to the judgment of a Reconstruction Congress. The following language appears at page 223 of the opinion in *Landry* v. *Daley.*

> "Thus, when the anti-injunction statute and the Civil Rights Act are viewed in their historical posture, their relationship becomes clearer. Section 1983, a product of a later Congress and an expression of an overwhelming Congressional concern for the protection of federal rights from desecration by state action would seem to have been intended to be an exception to the general limitation of § 2283.

> "Moreover, § 2283 is not a jurisdictional statute. In spite of its absolute language, it does not prevent a federal court from enjoining state court proceedings where special circumstances justify such relief. It is essentially a statutory adoption of the doctrine of comity and its demand is directed to the discretion of the federal court."

The Court stated that the *Dombrowski* and *Cameron* decisions cast doubt on the reasoning and the conclusion of the Fourth Circuit in *Baines*. It stated that the considerations which this Court recognized in *Dombrowski* as requiring full equitable relief where individuals or groups are being prosecuted for improper reasons unrelated to any valid state purpose or without probable cause in violation of their constitutionally protected freedoms, support the conclusion that § 2283 is inapplicable under such circumstances. This is said at page 224 of *Landry* v. *Daley*:

> "The alternative view that § 2283 bars a prayer for injunctive relief of all pending prosecution would severely limit the effective scope of § 1983. The scope of the remedy would then depend on the mere fortuity that the person affected by such harrassment had instituted a suit in the federal court before formal charges were brought against him in the state courts.
>
> * * *
>
> "Moreover, while the Supreme Court has never specifically passed on the point, the clear inference of its decisions and orders in *Dombrowski* and the first *Cameron* case is that § 2283 is not an absolute bar to injunctive relief in a § 1983 case where such a remedy is the only means of securing constitutionally protected rights. Inferentially at least, these decisions would appear inconsistent with the earlier Fourth and Seventh Circuit decisions holding § 2283 a bar and consistent with the contrary decision of the Third Circuit."

That such complete relief from the prior suppression of constitutionally protected material is the only means of securing to the petitioners their full First Amendment rights should be clear from the record of this case. It is the combination of illegal seizures in the past together with the announced intention of the authorities to disregard a requirement of substantive law under the First Amendment that make this record clear. It is not possible to reconcile the prosecution's position with good faith enforcement of the law.

Finally, the opinion of the Circuit Court below imposed upon the petitioners the requirement that they deliver to the Commonwealth Attorney, upon his request, a copy of the illegally seized movie for the latter's use in preparation and trial of the cases pending in the state court. See Appendix 24a. This requirement was imposed notwithstanding the holding that the seizures were illegal and unconstitutional. Proper motions for return of the illegally seized films were made. The District Court ordered the films returned. See Appendix 10a. It is respectfully submitted that the First Amendment is of no lesser dignity than the Fourth Amendment. If illegally seized evidence under the Fourth Amendment must be returned, why should illegally seized material under the First Amendent stand on lesser footing?

It is respectfully submitted that if copies of illegally seized films must be made available to the prosecution, the relief to which the petitioners are entitled is thereby made illusory and the prosecution, by retaining the fruits of an illegal and unconstitutional seizure, has been told that it can profit by conduct which is in violation of the First Amendment.

Since the seizure of the film "Angelique" in this case was accomplished without a prior adversary hearing on the question of its obscenity and was in flagrant disregard of petitioners' rights under the First Amendment, the petitioners respectfully submit that they are entitled to full equitable relief, including a stay of the pending state court prosecutions against them. Further, the Circuit Court's requirement that the petitioners make available to the prosecution copies of films illegally seized from them compels a consideration of this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

JOSEPH S. BAMBACUS
T. WILSON HOTZE, JR.
418 Mutual Building
Richmond, Virginia
Counsel for Petitioners

July, 1969

APPENDIX

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

Memorandum

MERHIGE, District Judge.

This is an action brought by plaintiffs seeking injunctive relief from the seizure of motion pictures and from criminal prosecutions based on the alleged offense of obscenity.

The Court having considered the pleadings, exhibits and statements of counsel, and the evidence of witnesses, finds as follows:

Jurisdiction of the Court is invoked under Title 42 United States Code Section 1983.

Plaintiff is a corporation operating a movie theater in the City of Richmond, within this district; the indivdual plantiff is a resident of Richmond, Virginia, and was manager of the movie theater on October 21, 1968; the defendant, Wilkinson, is the prosecuting attorney for the City of Richmond, Virginia; and the defendant, Duling, is the Chief of Police for the said city.

On or about March 21, 1966, with the acquiescence of the defendant, Wilkinson, members of the Police Department, one of whom had not attended a movie theater for some five to ten years prior thereto, commenced a series of raids on the Lee Art Theater, operated by the corporate plaintiff. In each instance the modus operandi would be for one or more police officers to view the films, prepare affidavits after consultation with the Commonwealth's Attorney, and secure a search warrant. In at least three instances in 1966 this procedure was followed, search warrants secured, and the officers seized certain films being shown by the corporate plaintiffs. The plaintiffs were prosecuted and found guilty in all three instances of having "exhibited in public a lewd and obscene motion picture." In one case

the United States Supreme Court reversed the conviction; in a second, the Supreme Court of Appeals of Virginia has issued a writ of error and will hear the matter; and in the third, a judgment of guilt became final without any appeal.

As a result of one of the raids, the corporate petitioner was forced to expend a sum in excess of $1,500.00 to install temporary projection machinery and to repair and re-install original equipment which the police officers had seized as having been used for the commission of a crime.

It is uncontradicted that the seizure of all of the films was accomplished without any prior adversary hearing on the question of obscenity. This by reason of the defendant, Wilkinson's view that the law doesn't require an adversary hearing prior to the seizure of the films in question. The Commonwealth's Attorney very frankly states to the Court that he does not intend to afford a prior adversary hearing in the event search warrants are secured for films which may be shown in the future unless and until, as he put it, he is satisfied that he is required to do so under the law.

As a result of a viewing of a film being shown by the plaintiff corporation, affidavits were filed by certain police officers and other parties affirming that each affiant "had witnessed a movie at Lee Art Theater, 934 West Grace Street, and found it to be obscene without redeeming social value and it goes substantially beyond community standards in the display of nudity and sex and the dominant theme or purpose appeals to the prurient interest," and upon their application a search warrant was issued, the theater raided, and the allegedly obscene films confiscated and delivered to the City Sergeant for the City of Richmond. There was admittedly no adversary hearing prior to either the issuance of a search warrant or the seizure of the films. It should be noted that the magistrate who issued the search

warrant likewise viewed the film prior to the issuance of said warrant.

Subsequent to said seizure, criminal informations were filed at the instance of the Commonwealth's Attorney, Wilkinson, charging the corporation and the plaintiff, Burtnett, with having unlawfully possessed, shown and exhibited in public a lewd and obscene motion picture in violation of the laws of Virginia. It would appear that the plaintiffs are charged with having violated the statutory laws of Virginia in reference to obscenity. See Title 18.1-227, etc., Code of Virginia 1960.

The plaintiffs ask this Court for equitable relief directing that the defendants return the prints of the motion picture films seized as aforesaid, and ask the Court to restrain the defendants, and all persons in concert with them, from seizing any prints of movie films, or otherwise interfering with the exhibition of any films exhibited by plaintiffs, prior to a determination of obscenity in an adversary proceeding. In addition, plaintiffs ask the Court to restrain the defendants from the further prosecution of the plaintiffs pursuant to the criminal informations filed by the defendant, Wilkinson, in the Hustings Court of the City of Richmond.

Defendants have moved the Court to dismiss the complaint and in argument before the Court, in essence denied that they are bound by certain opinions of the Supreme Court of the United States.

The facts are generally undisputed. It should be borne in mind that questions of abstention and of injunctive relief are not the same. See *Dombrowski* v. *Pfister*, 380 U.S. 479, 483, at 489, 85 S.Ct. 1116, 14 L.Ed.2d 22. Wherever federal courts sit, rights under the Federal Constitution are always a proper subject for adjudication. See *Zwickler* v. *Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967).

The plaintiffs in the instant case allege a violation of Constitutional rights. The real issue is whether the procedures employed by the defendants are Constitutionally insufficient by their admitted failure to take appropriate steps to adequately safeguard against the suppression of non-obscene movie films. There can be no doubt but that it has certainly, since 1951, been settled that motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secure to any form of "speech" or "the press." The establishment of the Congressional guarantees of freedom of speech and press have, since the case of *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, has been consistently followed. (Note: *Kingsley International Pictures Corp.* v. *Regents of University of State of New York,* 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (1959); *Jacobellis* v. *State of Ohio,* 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964); *Metzger* v. *Pearcy,* 393 F.2d 202 (7 Cir. 1968).)

It should be noted that the Virginia law provides a method which, although not required by Virginia law, may be employed in order to afford an adversary hearing in proceedings against movie films alleged to be obscene. See 18.1-236.3 Va. Code 1960 and 1968 supplement 18.1-236.4.

The Court does not find it necessary to pass upon the Constitutionality of any Virginia statute, nor must this Court pass upon the alleged obscenity of the movie films in question.

Defendant, Wilkinson, has testified that he did not employ the procedures afforded under the Virginia statute aforementioned prior to acquiescing in the seizure on the grounds that he did not think it fair to subject one to a civil proceeding and then perhaps to subsequently prosecute.

It is difficult for this Court to recognize the logic of subjecting a person first to a criminal prosecution, with the attendant notoriety, by reason of a desire not to put one to the difficulty of a civil proceeding. There is no doubt in this Court's mind but that the seizure of the films in the instant case, and the manner in which it was done, falls short of due process. An informal gathering of police officers, prosecuting authorities, and a magistrate who issued a search warrant, by reason of their having purchased admission tickets to a theater and having viewed the film in question, does not amount to due process.

In order to properly protect the freedoms afforded by the First Amendment to the Constitution of the United States, there must be conformity to procedures that insure against the curtailment of Constitutionally protected expression which, as stated in the case *A Quantity of Books* v. *Kansas,* 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809, "is often separated from obscenity only by a dim and uncertain line."

The object of an adversary hearing is to insure that expression will not be suppressed without contest and justification. An adversary proceeding contemplates an opportunity for one to be afforded the protection of the First Amendment to the Constitution of the United States. Allegedly obscene publications or movies are not to be treated the same way as narcotics, gambling paraphernalia and other contraband. The legal rules governing the former are different from the latter. *Metzger* v. *Pearcy, supra.*

The defendants' argument that they are not bound by the decision of the *A Quantity of Books* v. *Kansas* holding of the United States Supreme Court, coupled with the defendant, Wilkinson's announced intention to continue the authorizing of the seizure of allegedly obscene motion pictures without affording the possessors and exhibitors

of same a prior adversary hearing to determine if same are obscene, leaves the Court no alternative except to issue an appropriate injunction.

The freedom of press and expression, whether it be through newspapers or motion pictures, is too precious a freedom to permit the risk of suppression of non-obscene material simply because a law enforcement officer announces an intention not to afford a prior adversary hearing unless directed to do so by a Court, or his present interpretation of the law changes.

An appopriate order directing the defendants to cause to be returned the picture film seized on October 21, 1968, will be entered, and defendants and all acting in concert with them will be enjoined from seizing allegedly obscene motion pictures without affording a prior adversary hearing to the possessors and exhibitors of same. The Court finds no valid reason why it should not refrain from granting equitable relief from the criminal prosecution now pending; if plaintiffs did in fact possess and exhibit obscene motion picture films in violation of law a prosecution of same is entirely appropriate. The instant case differs from the case of *Dombrowski, supra,* in this regard in that the Court does not find bad faith on the part of the defendants which might constitute a ground for said equitable relief from State court criminal proceedings. On the contra, while disagreeing with the defendants' contentions, the Court has no reason to believe that they acted in anything but good faith, and plaintiffs' prayer for an injunction enjoining the defendants from the pending criminal prosecution will be denied.

The defendant, Wilkinson, having announced his intention to apply to the Fourth Circuit Court of Appeals for immediate relief from this Court's order, said order will

contain a provision that same be stayed for a period of ten days in order to afford the defendants the opportunity requested.

An order in conformance with this memorandum will be entered.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Decided May 6, 1969

BUTZNER, Circuit Judge:

In October 1968 the defendants, the Commonwealth's Attorney and the Chief of Police for the City of Richmond, seized the film, "Angelique in Black Leather," at the Lee Art Theater, which is operated by the plaintiffs.[1] They had a search warrant secured upon affidavits of four police officers and two lawyers, who, along with the magistrate who issued the warrant, had all viewed the film. Subsequently, the theater was charged with possessing and exhibiting an obscene movie.[2] The theater in turn brought

[1] Tyrone, Inc is the lessee of the theatre. Howard William Burtnett is its manager. For convenience the plaintiffs will be referred to as the theatre. Generally the defendants will be referred to as the Commonwealth's Attorney. The police also seized previews or fliers of another film.

[2] The prosecution was initiated under Virginia's obscenity statutes. Va. Code Ann. § 18.1-227 to -236.4 (1960). Three times previously Lee Art films have been seized and convictions obtained. The first conviction, based on a seizure in March 1966, was overturned by the United States Supreme Court in Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968). Another conviction, based on an August 1966 seizure, was not appealed. And a third, which followed a seizure in October 1966, is on a writ of error to the Supreme Court of Appeals of Virginia. In October 1966 the police also seized, but later returned, Lee Art's projection equipment.

this action under 42 U.S.C. § 1983, alleging violation of its First, Fourth, and Fourteenth Amendment rights. The sole claim is that the Constitution required an adversary hearing to determine obscenity before the film could be seized. The thrust of the complaint is that the seizure and the threat of its repetition will result in the suppression of nonobscene material. Not at issue, therefore, are the constitutionality of Virginia's obscenity statutes or the obscenity of "Angelique."

The district court granted an injunction which required the Commonwealth's Attorney to return the film and prohibited the seizure of any other until its obscenity had been determined in an adversary hearing. The court refused, however, to enjoin the prosecution of the theatre in state court. On appeal, the Commonwealth's Attorney attacks the injunction, and the theatre seeks to expand it to include a ban on the prosecution. We enforce the injunction as written, except that we will require the theatre to make available a copy of "Angelique" for the preparation and trial of the criminal cases. *Metzger* v. *Pearcy*, 393 F.2d 202, 204 (7th Cir. 1968).

I.

In *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964), the Court reversed an order for the destruction of books which had been seized on a search warrant issued by a judge who had made only an *ex parte* determination of obscenity. The books had been impounded and later condemned as obscene after an adversary hearing. In reversing, four Justices of the Supreme Court found the seizure constitutionally insufficient because there had been no adversary hearing on the issue of obscenity before the books were con-

fiscated.[3] This decision, we believe, is applicable to motion pictures. The First and Fourteenth Amendments protect the expression of ideas through movies, *Burstyn* v. *Wilson,* 343 U.S. 495 (1952), and the reasons for an adversary hearing before seizure apply as strongly to them as they do to books. The hearing, of cours, is not designed to facilitate the display of obscene material, for public obscenity is not constitutionally protected. *Roth* v. *United States* 354 U.S. 476, 485 (1957); see *Stanley* v. *Georgia,* 37 U.S.L.W. 4315, 4318 (U.S. April 7, 1969) (dictum). On the contrary, as the opinion of the Court in *A Quantity of Books* makes clear, the purpose of the hearing is to safeguard against governmental suppression of nonobscene expression. With movies, as with books, "the separation of legitimate from illegitimate speech calls for sensitive tools. . . ." *A Quantity of Books* v. *Kansas,* 378 U.S. 205, 212 (1964), quoting *Speiser* v. *Randall,* 317 U.S. 513, 525 (1958).

We find support in *Metzger* v. *Pearcy,* 393 F.2d 202 (7th Cir. 1968), where the Seventh Circuit required a prior adversary hearing in a situation identical to ours in every significant way. The police lacked a search warrant there, but that provides no basis for distinguishing the case because the court focused on the lack of the hearing. *Metzger* included a requirement, which we find reasonable and also adopt, that the theatre deliver to the Commonwealth's Attorney, upon request, a copy of the movie for reasonable

[3] Mr. Justice Brennan wrote the opinion of the Court in which the Chief Justice, Mr. Justice White, and Mr. Justice Goldberg joined. Mr. Justice Black and Mr. Justice Douglas concurred because, on the basis of views they had previously expressed, the Kansas statute authorizing the destruction of the books violated the First and Fourteenth Amendments. Mr. Justice Stewart concurred on the ground that the books were not hard-core pornography. Mr. Justice Harlan and Mr. Justice Clark dissented because in their view Kansas could find the books obscene and seize them without an adversary hearing.

use in the preparation and trial of the charges now pending in the state court.[4]

In holding that the Constitution requires an adversary hearing to determine obscenity before seizure of a movie, we do not imply that the hearing must be a fully matured action at law. Matters of comparable importance are often determined on an application for a preliminary injunction, after notice to the adverse party and an opportunity for him to be heard. Cf. *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957). An order to show cause why the film should not be seized as obscene presents another possibility. Va. Code Ann. § 18.1-236.3 (1960), *as amended* (Supp. 1968). But in whatever form, the proceedings must be "designed to focus searchingly on the question of obscenity." *Marcus* v. *Search Warrant*, 367 U.S. 717, 732 (1961).

II.

In assigning cross-error to the district judge's refusal to enjoin the state court prosecutions, the theatre urges that 28 U.S.C. § 2283 is not applicable.[5] This statute generally prohibits a federal court from staying proceedings in a state court. Nevertheless, the theatre argues, 42 U.S.C. § 1983[6] creates a statutory exception to § 2283 for the en-

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[4] We express, however, no opinion on the film's admissibility in evidence.

[5] 28 U.S.C. § 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[6] 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

forcement of First Amendment rights. We need not pursue this approach to the problem, for it is clear that the application for the injunction lacks equity.[7] Comity dictates denial of federal injunctive relief against state prosecutions that challenge First Amendment rights when it does not appear that the accused have "been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford [the accused] any protection which they could not secure by prompt trial and appeal pursued to this Court." *Douglas* v. *City of Jeannette,* 319 U.S. 157, 164 1943); cf. *Broyhill* v. *Morris,* ..... F.2d ..... (4th Cir. 1969). On the other hand, suppression of First Amendment rights of bad faith enforcement of a statute unconstitutional on its face or as applied justifies immediate prohibition. Then the chilling effect on the full exercise of First Amendment freedoms results from the prosecution itself. Abatement need not await vindication in the criminal court. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); cf. *Zwickler* v. *Koota,* 389 U.S. 241 (1967). But here the theatre does not challenge either the constitutionality or the application of Virginia statutes forbidding the exhibition of obscene movies. Additionally, the Commonwealth's Attorney, the district judge found, acted in good

[7] The Supreme Court has expressly left open the question whether suits under 42 U.S.C. § 1983 constitute an exception to 28 U.S.C. § 2283. Cameron v. Johnson, 390 U.S. 611, 613, n. 3 (1968); Dombrowski v. Pfister, 380 U.S. 479, 484, n. 2 (1965). We have held that they do not. Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964), *cert. denied,* 381 U.S. 939 (1965). Accord, Goss v. Illinois, 312 F.2d 257 (7th Cir. 1963); Sexton v. Barry, 233 F.2d 220 (6th Cir. 1956). Contra, Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950); Landry v. Daley, 288 F.Supp. 200 (N.D. Ill. 1968). See also, ALI Study of the Division of Jurisdiction between State and Federal Courts § 1372(7) (Tent. Draft No. 6, 1968).

faith when he decided that under state and federal law the film could be seized for evidentiary purposes without a prior adversary hearing.

The theatre's attack upon this finding of good faith fails to establish that it is clearly erroneous. It has not been shown that the prosecutor sought to use the seizure as a covert device for suppression of the film by delaying trial. Nor has the earlier seizure of the projection equipment been repeated. More importantly, the Commonwealth's Attorney applied for a search warrant only after the magistrate had viewed the film. And he justifies this procedure by citing *Lee Art Theatre, Inc.* v. *Virginia*, 392 U.S. 636 (1968), in which the same parties were involved. There the Court, in voiding a search warrant issued upon a single policeman's conclusion of obscenity, observed that it was unnecessary to decide "whether the justice of the peace should have viewed the motion picture before issuing the warrant." The Commonwealth's Attorney's interpretation of this remark cannot be equated with bad faith.

In sum, we have here good faith enforcement of an obscenity statute and no constitutional challenge to that statute. The district judge properly refused to enjoin the state court prosecutions. *Cameron* v. *Johnson*, 390 U.S. 611 (1968).

III.

The Commonwealth's Attorney argues that under 28 U.S.C. § 2281 this case should have been heard by a three-judge district court.[8] The film was seized in accordance with Virginia statutes setting out procedures for the search

[8] Title 28 U.S.C. § 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an

and seizure of contraband, including obscene material. Va. Code Ann. § 19.1-83 to -87 (1960), *as amended,* (Supp. 1968). An attack on the constitutionality of the seizure must therefore, he urges, be an attack on the constitutionality of Virginia's search and seizure statutes. This is true, he says, even though the theatre in its complaint, and consistently thereafter, has carefully limited its attack to the specific seizure, without charging that any Virginia statute is unconstitutional.

We conclude, however, that a three-judge court was not required. The theatre does not contest the authority of the Commonwealth's Attorney to seize obscene films. It simply asserts that first there must be an adversary hearing to determine obscenity. Virginia's search and seizure statutes require the judge or justice issuing the warrant to be satisfied that there is reasonable cause for the search. Generally, reasonable cause can be established from an affidavit, but the judge need not accept the affidavit alone, and nothing in the statutes prohibits him from conducting an adversary hearing, as the Constitution requires.[9] When as here, statutes would be constitutionally applied if administered properly, a single judge has jurisdiction. Cf. *Chester* v. *Kinnamon,* 276 F.Supp. 717 (D.Md. 1967).

In *Phillips* v. *United States,* 312 U.S. 246, 251 (1941), Mr. Justice Frankfurter, holding a three-judge court unnecessary in an analogous situation wrote:—

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administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

[9] Virginia also has established procedures—not used here—to provide an adversary hearing before seizure of motion picture films. Va. Code Ann. § 18.1-236.3 (1960), *as amended,* Va. Code Ann. § 18.1-236.4 (Supp. 1968).

"The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases.

* * *

"Some constitutional or statuory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the congressional scheme of [28 U.S.C. § 2281]. It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law. In other words, it seeks a restraint not of a statute but of an executive action. But the enforcement of a 'statute,' within the meaning of [28 U.S.C.§ 2281], is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness."

No. 13,192 is remanded to permit the district court to amend its injunction to make the film reasonably available to the Commonwealth's Attorney. In all other respects, the judgment is affirmed.

No. 13,193 is affirmed.

SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1969

No. 409

JAMES B. WILKINSON, Commonwealth's Attorney for the City of Richmond, Virginia, and FRANK S. DULING, Chief of Police for the City of Richmond, Virginia,

Petitioners,

v.

TYRONE, INC., a Virginia Corporation, trading as Lee Art Theatre, and HOWARD WILLIAM BURTNETT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 410 F.2d 639. The opinion of the United States District Court for the Eastern District of Virginia is reported in 294 F.Supp. 1330.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1969. The petition for a writ of certiorari was filed

on August 1, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does the seizure of motion picture films by the petitioners without affording to the respondents a prior adversary hearing on the question of alleged obscenity violate the First Amendment of the United States Constitution?

2. On the facts of this case, are the respondents entitled to equitable relief from pending state court prosecution?

STATEMENT

On the night of October 21, 1968, the motion picture film, "Angelique in Black Leather," and the previews of another film, "Of the Same Gender," were seized by Richmond police officers acting at the direction of the petitioners, the Commonwealth's Attorney and the Chief of Police for the City of Richmond, Virginia. Prior to the seizure, which occurred during the business hours of the respondents' theatre, the police officers had obtained a search warrant which had commanded them to enter the theatre operated by the respondents at 934 West Grace Street, Richmond, Virginia, and there seize the said "obscene films."

Prior to the interruption of the respondents' business operations by the seizure on the evening of October 21, 1968, there had been no adversary determination of the obscenity of the films and prints in question. No adversary hearing on the question of alleged obscenity had been afforded the owner of the film, or the exhibitor, Tyrone, Inc., or its theatre manager, the respondent, Burtnett. The seizures were without the consent of the respondents and without any notice to them in advance.

Following seizure of the films, Criminal Informations were returned in the state court charging the respondent, Tyrone, Inc., with the possession and exhibition of a lewd and obscene motion picture and charging Howard William Burtnett with managing a theatre where an obscene motion picture was shown and displayed to the public. The criminal cases against the respondents are now pending and awaiting trial in the Hustings Court of the City of Richmond. The films and prints in question have remained in the possession of the petitioners.

The respondents initiated this case by bringing an action under 42 U.S.C. § 1983, the Civil Rights Act, alleging a violation of their rights under the First, Fourth, and Fourteenth Amendments and praying for equitable relief from the seizures. The respondents seek an injunction against the pending and any further prosecutions on obscenity charges, where seizures of motion picture films are made without a prior adversary hearing on the question of obscenity. The thrust of the complaint was that the seizures materially and adversely affected the Constitutional rights of the respondents by inhibiting dissemination of presumably protected motion pictures that had not been declared to be obscene or in violation of any law. It was alleged that the seizures and the threats of seizures amounted to repression of protected freedoms, and that the facts of the case demonstrated irreparable damage and injury.

The evidence in support of the respondents' case in the District Court established an unequivocal pattern of past conduct on the part of law enforcement officials in the City of Richmond. There had been three prior raids on the theatre resulting in the seizures of films. The first raid occurred in March, 1966, which resulted in a conviction which was overturned later by the United States Supreme

Court in *Lee Art Theatre, Inc.* v. *Virginia*, 392 U.S. 636 (1968). The second raid occurred in August, 1966, and resulted in a conviction which was not appealed. In October, 1966, another raid and seizure resulted in a conviction which is now on appeal in the Supreme Court of Appeals of Virginia. In each case police officers raided the respondents' theatre after securing search warrants and after consultation with the petitioner, Wilkinson. On one of these occasions, October 26, 1966, two 35 millimeter movie projectors were seized. On the same occasion police officers damaged machinery and equipment belonging to the theatre owners, including the cutting of cables and the electrical wiring to the motion picture projectors, thereby forcing the theatre owners to spend in excess of $1,500.00 for repairs. This damage was unrelated to any legitimate state purpose.

The petitioner, Wilkinson, testified in the District Court. He admitted that the seizures of all films in 1966 and in 1968 were accomplished in the absence of a prior adversary hearing on the question of obscenity. He defended the seizure of the projectors on the theory that they were instrumentalities used in the commission of a crime. He stated that the seizures would be repeated in the future, and that he did not intend to afford a prior adversary hearing until he was ordered to do so by some authority of competent jurisdiction. He stated that he was familiar with the decision of the United States Supreme Court in *A Quantity of Books* v. *Kansas*, 378 U.S. 205, at the time of all the aforesaid seizures, but stated that he did not feel bound by that decision.

Virginia law provides a method which, although not required by Virginia law, may be employed to afford an adversary hearing in proceedings against movie films alleged to be obscene. See § 18.1-236.3, Virginia Code, 1960,

and 1968 Supplement, § 18.1-234.4. The petitioner, Wilkinson, admitted that the State statutes herein referred to outline a procedure whereby he could have afforded the respondents a prior adversary hearing, but he failed to satisfactorily explain why he ignored them.

ARGUMENT

I

The first issue in this case is whether the petitioners, in instituting a criminal obscenity prosecution following the seizure of a motion picture film without first affording the possessors or exhibitors of the film a prior adversary hearing on the film's alleged obscenity, are in violation of the Constitution. *A Quantity of Books* v. *Kansas,* 378 U.S. 205, 12 L.Ed.2d 809 (1964) holds that before presumably protected material can be seized a prior adversary hearing is constitutionally necessary under the First and Fourteenth Amendments.

The petitioners contend that since only four justices concurred in the procedural basis for the opinion in *Books,* it is not binding on them. With respect to this contention, the respondents submit that more recent opinions by the Supreme Court and other courts have treated this "opinion of the Court" as establishing the law on this point. *Freedman* v. *Maryland,* 380 U.S. 51, 13 L.Ed.2d 649 (1965); *Metzger* v. *Pearcy,* 393 F.2d 202 (7 Cir. 1968); *United States* v. *18 Packages of Magazines,* 238 F.Supp. 846 (N.D. Calif. 1964); *Cambist Films* v. *Illinois,* 292 F.Supp. 185 (N.D. Ill. 1968).

A Quantity of Books v. *Kansas, supra,* represents no radical departure from existing precedents. Operating under the Kansas statutes in that case, the State Attorney General filed seven novels with his complaint and identified

by information some 59 novels. Further, although it was not required under the Kansas statutes, the district judge, on application of the Attorney General, conducted a 45 minute ex parte inquiry during which he "scrutinized" the seven books. These steps were thought by the Kansas Attorney General to be necessary under *Marcus* v. *Search Warrant,* 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127. When the warrant was executed, 31 of the identified 59 novels were seized, including all copies of the 31 books.

The following language in the Court's opinion in *Books* should leave no doubt as to the reason for reversal, 12 L.Ed.2d at page 812:

> "It is our view that since the warrant here authorized the sheriff to seize all copies of the specified titles and since P-K was not afforded a hearing on the question of the obscenity even of the seven novels before the warrant issue, the procedure was likewise constitutionally deficient. This is the teaching of *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 1 L.Ed.2d, 1469, 77 S.Ct. 1325. See *Marcus,* 367 U.S. at pp. 734-738, 6 L.Ed.2d 1138, 1139. The New York injunctive procedure there sustained does not afford ex parte relief but postpones all injunctive relief until both sides have had an opportunity to be heard. *Tenny* v. *Liberty News Distributors,* 13 App.Div.2d 770, 215 NYS2d 663, 664. In *Marcus* we explicitly said that Kingsley Books 'does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene.' "

The argument of the petitioners is that by their attempted compliance with *Marcus* v. *Search Warrant, supra,* they are free to ignore later decisions of the United States Supreme Court. They take the same position now as was taken by

the Kansas Attorney General in the *Books* case, which was decided three years after *Marcus*. Moreover, the position of the defendants completely ignores the rulings of this Court in the movie censorship cases, including *Freedman* v. *Maryland*, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734, (1965).

In *Freedman* v. *Maryland, supra,* this Court struck down the Maryland censorship statute precisely because there was no procedure therein contained for prompt judicial review concerning the alleged obscenity of a film. The Court said, at page 654 of the opinion in 13 L.Ed.2d 624:

> "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. See *Bantam Books, Inc.* v. *Sullivan, supra; A Quantity of Books* v. *Kansas,* 378 U.S. 205, 12 L.Ed.2d 809, 84 S.Ct. 1723, *Marcus* v. *Search Warrant, supra; Manual Enterprises* v. *Day,* 370 U.S. 478, 8 L.Ed.2d 639, 82 S.Ct. 1432 . . ."

Also, *Freedman* v. *Maryland, supra,* is relevant because it pointed the way for the petitioners. The Court cited there *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 1 L.Ed. 2d 1469, which upheld a New York injunctive procedure designed to prevent the sale of obscene books. That procedure postponed any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. Further, there are existing Virginia statutes, specifically Sections 18.1-236.3 and 18.1-236.4 of the 1950 Virginia Code as amended (1968 Supp.) which were available to the petitioners and which could have been used by the petitioners to afford to the respondents a prior

adversary hearing on the alleged obscenity of the film in question.

There can be no doubt on the facts in the case at bar that an effective prior restraint was imposed on the petitioners by the police seizure of their motion picture "Angelique." Since the seizure of the film was without a prior adversary determination of the film's obscenity, there has been an abridgment of the right of the public in a free society to unobstructed circulation of films.

In reversing *Lee Art Theatre* v. *Virginia*, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103, (1968) this Court cited two cases, *Marcus* v. *Search Warrant, supra,* and *Freedman* v. *Maryland, supra. Marcus* has been the law since 1961, and the respondents submit that it was unnecessary for the Court in *Lee Art Theatre* v. *Virginia,* to base its judgment for reversal on *A Quantity of Books* v. *Kansas.* Therefore, the failure of the Court there to cite *Books* can offer no comfort to petitioners inasmuch as *Books* has been the law since 1964.

Schackman v. *Arnebergh,* 258 F.Supp. 983, (1966), cited by the petitioners, is distinguishable because that case holds that no prior adversary hearing is necessary prior to arrest of a defendant, a situation entirely different from the questions and facts here presented.

The purpose of the procedural requirement of an adversary hearing is to safeguard against governmental suppression of expression. Such a requirement does not prohibit prosecution under obscenity statutues. The lesson of the cases cited is simply that seizuure of allegedly obscene publications or films without a prior adversary proceeding on the issue of obscenity violates the First Amendment to the Constitution of the United States and is a prior restraint condemned by this Court. See *Joseph Burstyn, Inc.*

v. *Wilson,* 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098; *Kingsley* v. *Brown, supra; Jacobellis* v. *Ohio,* 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793; *Metzger* v. *Pearcy,* 393 F.2d 202 (7 Cir. 1968).

II

In this case the respondents did not ask the United States District Court to declare any State statute unconstitutional. Further, the respondents did not base their prayer for relief upon the ground of the unconstitutionality of any State statute. Therefore, there was no necessity for the convening of a three judge Federal Court pursuant to Title 28 U.S.C. § 2281. See *Swift & Co.* v. *Wickham,* 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194.

The complaint filed by the respondents in the District Court pursuant to the Civil Rights Act, Title 42 U.S.C. § 1983, depicted a pattern of conduct on the part of State officials that abridged the constitutional rights of the respondents and amounted to nothing less than bad faith enforcement of State law. (See petitioners' Appendix, pp. A20-A26.) The evidence heard in the District Court revealed a series of unconstitutional seizures of motion picture films, damage by police officials to the property of the respondents, and an announced intention by the petitioners to continue the illegal and unconstitutional seizures.

The respondents recognize that Federal injunctive relief is normally not granted to stop prosecution in a state court, but it is submitted that in the area of First Amendment freedoms, an exception has been recognized by this Court. It has been recognized that the exercise of these freedoms is subject to irreparable injury when unlawful criminal prosecution is threatened or maintained. See *NAACP* v. *Button,* 371 U.S. 415 (1963); *Tugwell* v. *Bush,* 367 U.S.

907 (1961); *Gremillion* v. *United States,* 368 U.S. 11 (1961). Further, the alternative holding of *Dombrowski* v. *Pfister,* 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116, is that bad faith enforcement of state law will justify Federal injunctive relief from state criminal prosecution.

In *Dombrowski* v. *Pfister, supra,* this Court said, at pages 27 and 28 of the opinion in 14 L.Ed.2d:

> "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings. In *Douglas* v. *City of Jeanette,* 319 U.S. 157, 87 L.Ed. 1324, 63 S.Ct. 877, for example, the Court upheld a district court's refusal to enjoin application of a city ordinance to religious solicitation, even though the ordinance was that very day held unconstitutional as so applied on review of a criminal conviction under it. *Murdock* v. *Pennsylvania,* 319 U.S. 105, 87 L.Ed. 1292, 63 S.Ct. 870, 882, 146 ALR 81. Since injunctive relief looks to the future, and it was not alleged that Pennsylvania courts and prosecutors would fail to respect the Murdock ruling, the Court found nothing to justify an injunction. And in a variety of other contexts the Court has found no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution. In such cases it does not appear that the plaintiffs have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith or that a federal court of equity by withdrawing the determination of guilt from the state courts would rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court. *Douglas* v. *Jeanette, supra,* 319 U.S. 164, 87 L.Ed. at 1330.

> "But the allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedoms will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury."

The conduct of the petitioners commencing with the initial raids on the respondents' theatre in March, 1966, the later raids during 1966, the raids resulting in the prosecutions now pending in the Hustings Court of the City of Richmond and in the Supreme Court of Appeals of Virginia, the unexplained seizure of motion picture projectors, the wilful damage inflicted on the property of the respondents, the avowed and expressed intention of the petitioner, Wilkinson, to continue seizures of films without first affording respondents the requisite adversary hearings, notwithstanding his prior knowledge of and familiarity with *A Quantity of Books* v. *Kansas, supra*, and the existence and availability of a State procedure relating to adversary hearings, all combine to present for this Court a chilling picture of prior restraint and irreparable injury.

Freedom of expression, protected by the First Amendment, becomes meaningless if the respondents must ultimately await the Supreme Court's review in every case brought by the petitioners. Unlike the situation in *Douglas* v. *City of Jeanette*, 319 U.S. 157, 87 L.Ed. 1324, 63 S.Ct. 877, the record here clearly demonstrates that the petitioners have been and are refusing to recognize existing constitutional law rulings of the United States Supreme Court. In this area of First Amendment freedoms, the prior suppression of motion picture films, together with the publicly announced intention of the petitioners to continue

the seizures in violation of existing law, clearly shows the necessary irreparable injury. It is respectfully submitted that the Courts below were correct in enjoining future seizures without prior adversary hearings, but they erred in holding on the undisputed evidence that there was no bad faith enforcement of state law which would justify injunctive relief from the pending state prosecution under *Dombrowski.* No magic words can change the clear meaning of the facts of this case. The unconstitutional seizures of protected material, the wilful damage to the respondents' business and property, unrelated to any legitimate state interest, the danger to the public at large in a free society, the admission by the petitioners of knowledge of the requirement of *Books, supra,* the announced intention of the petitioners to continue their unconstitutional conduct, unless enjoined, are facts susceptible of but one interpretation. It is difficult to imagine a case where there is more undisputed, objective evidence of bad faith and of a continuing course of conduct by state officials to improperly suppress expression.

Therefore, because the petitioners have engaged in a course of conduct in serious and wilful violations of the rights of the respondents under the Constitution of the United States over a period of almost three years, and because they have expressed their intention to continue said conduct until enjoined or until they change their interpretation of the law, the decisions of this Court to the contrary notwithstanding, the respondents submit that this is a proper case for injunctive relief both from the pending prosecution in the Hustings Court of the City of Richmond, Virginia, as well as from any future seizures without first affording the respondents a prior adversary hearing on the question of obscenity.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari filed by the petitioners in this case should be denied, and that the petition for a writ of certiorari filed by the respondents as petitioners in the case of Tyrone, Inc., etc. and Howard William Burtnett, Petitioners v. James B. Wilkinson, etc. and Frank S. Duling, etc., Respondents, should be granted.

Respectfully submitted,

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November 19, 1969

SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1969

No. 418

TYRONE, INC., A VIRGINIA CORPORATION,
TRADING AS LEE ART THEATRE, and
HOWARD WILLIAM BURTNETT,
Petitioners,

v.

JAMES B. WILKINSON, COMMONWEALTH'S ATTORNEY
FOR THE CITY OF RICHMOND, VIRGINIA, and
FRANK S. DULING, CHIEF OF POLICE FOR
THE CITY OF RICHMOND, VIRGINIA,
Respondents.

REPLY BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES B. WILKINSON
Attorney for the Commonwealth for the City of Richmond, Virginia

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Respondents.

REPLY BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Respondents in this cause respectfully submit this brief in opposition to the petition for a writ of certiorari filed by Tyrone, Inc. etc and Howard William Burtnett in the above styled cause.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia is reported in 294 F. Supp.

1330 and the opinion of the United States Court of Appeals for the Fourth Circuit is in the appendix of this brief. The opinion of the Court of Appeals for the Fourth Circuit was rendered on May 6, 1969.

QUESTIONS PRESENTED

I. Does the seizure of motion picture films in violation of the First Amendment, together with the other facts of this case, entitle the petitioners to equitable relief from state court prosecution based on said seizures?

II. Did the United States Court of Appeals for the Fourth Circuit err when it imposed on petitioners the requirements of making available to the State copies of illegally seized films for use in the state court prosecution against the petitioners?

STATUTES INVOLVED

Title 42, United States Code: § 1983

> "Every person who, under color of any statute, ordinance, regulation, custody, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress."

Title 28, United States Code: § 2283

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

STATEMENT OF FACTS

This case was commenced on October 19, 1968, when several members of the Vice Squad of the Richmond Bureau of Police paid their admission into the Lee Art Theatre located at 934 West Grace Street, Richmond, Virginia, to view the motion picture "Angelique in Black Leather". After the officers viewed the movie, they reported their findings to defendant Wilkinson and requested that other persons also view the movie to determine if probable cause existed for issuance of a search warrant. An Assistant Commonwealth Attorney, accompanied by another lawyer, police officer and a magistrate, went to the Lee Art Theatre on October 21, 1968, to view the movie "Angelique in Black Leather". Upon their return from the movie, four police officers and two lawyers filed affidavits with Andrew J. Winston, a Magistrate for the City of Richmond, Virginia, stating facts establishing probable cause for the issuance of a search warrant. The Magistrate which issued the search warrant personally viewed the motion picture in question.

The search warrants were issued by Magistrate Winston and the movie "Angelique in Black Leather" was seized. The following day a criminal information was filed in the Hustings Court of the City of Richmond, charging that Tyrone, Inc. "unlawfully and knowingly did a cause to be possessed, shown and exhibited in public a lewd and obscene motion picture, to-wit, 'Angelique in Black Leather' * * *." A separate criminal information alleged that the manager of said Theatre did "unlawfully and knowingly manage a theatre, to-wit the Lee Art Theatre at 934 West Grace Street where an exhibition of an obscene motion picture by the name of 'Angelique in Black Leather' was shown and displayed to the public". The plaintiff, Howard William Burtnett, Jr., was bailed in the sum of $500.00 with surety

for his appearance in the Hustings Court of the City of Richmond, and since the other plaintiff was a corporation, no bond was required.

The plaintiff then filed motions for a *subpoena duces tecum* to compel Rappahannock Theatre, Inc. to produce the film "If He Hollers, Let Him Go" and also the motion picture "Barbarella". The Honorable Samuel B. Witt, Jr., Judge of the Hustings Court of the City of Richmond, refused the issuance of the requested subpoenas.

Subsequent to this the Petitioners, by counsel moved the Hustings Court for an order compelling the Respondents to return to the Petitioners the motion picture film "Angelique in Black Leather" and the previews of "The Same Gender". Judge Witt overruled this motion. The petitioners then filed in the United States District Court of the Eastern District of Virginia the complaint which is the subject matter of this litigation.

The order of the Honorable Samuel B. Witt, Jr., Judge of the Hustings Court, refusing the return of the motion picture "Angelique in Black Leather" was not appealed to the Supreme Court of Appeals of Virginia. The Hustings Court of the City of Richmond is an intermediate Court in the Commonwealth of Virginia and is not a Court of last resort in the State. The petitioners did not exhaust any further State remedies prior to filing the complaint in the United States District Court under Title 42, United States Code, Section 1983.

ARGUMENT

This is a cross appeal filed by Tyrone, Inc., a Virginia corporation, trading as Lee Art Theatre and Howard William Burtnett. The Respondents, James B. Wilkinson and Frank S. Duling, have also filed for a writ of certiorari

to the judgment of the United States Court of Appeals for the Fourth Circuit and that case is number 409, October term, 1969, and is now pending before this Honorable Court.

For the sake of brevity the argument set forth in that brief will not be restated herein. However, that brief is incorporated into this one by reference. The aforesaid brief answers the first question presented by the petitioners in this brief.

It is respectfully submitted that Title 28 of the United States Code annotated, Section 2283, gives a complete answer to the second question presented by the petitioners. The statute is clear, concise and not ambiguous. It states in clear terms that:

> "'A court of the United States may not grant an injunction to stay a proceeding in the state court except as expressly authorized by an act of Congress or where necessary in aid of its juridiction or to protect or effectuate it judgment."

There was no evidence before the District Court that an injunction to stay the State Court proceedings were necessary in aid of its jurisdiction or to protect or effectuate its judgment. The Respondent, James B. Wilkinson, only stated what in his opinion was the law as to a prior adversary hearing before the seizure of alleged obscene materials. He relied on *United States* v. *Pink,* 315 U.S. 203 at page 216, which states as follows:

> "The lack of an agreement by a majority of the court on the principles of law involved prevents it from being an authoritative determination of other cases."

This position is supported by secondary authority in 5 A.L.R. 3rd 1226. At this time there is no ruling from the United States Supreme Court where a majority of the Jus-

tices had agreed that a prior adversary hearing was necessary before the seizure of alleged obscene materials. The affidavits that had been filed by four police officers, two lawyers reviewing the motion picture in question and the observation of the same by the Magistrate was sufficient to establish probable cause for the issuance of a search warrant in this instance.

The petitioners continually speak of bad faith on part of the Commonwealth's Attorney and the Chief of Police relative to this prosecution but the evidence falls far short of the necessary proof to establish this as a fact. The evidence is clear and convincing that the Commonwealth's Attorney and the Chief of Police acted in the utmost good faith in this prosecution and endeavored with order and regularity to follow the decisions of this Honorable Court.

In *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636 (1968) this Court in a per curiam decision set forth guide lines to be followed in the seizure of alleged obscene materials. These guide lines were as follows:

> 1. Seizure of material should not be allowed on the conclusory assertions of a single police officer. This necessarily shows that before material alleged to be obscene is seized there should be more than one person's determination of its obscenity. In the instance case, six persons filed affidavits, all of which concluded the film violated the Virginia obscenity statute and were obscene. They set out with certainty the scenes in the motion picture which made it obscene under the law and not protected material.
>
> Under the law, at this stage of the prosecution, the State only had to prove probable cause and no more. This the affidavits did. It should be noted that the affiants were responsible, honest and law abiding citizens. They made oath to facts proving probable cause. The affidavits are entitled to credibility. The allegations in the affidavits have never been denied by the petitioners.

2. In the instant case, before the search warrant was issued, the Magistrate, himself, viewed the motion picture in question to make an independent judicial determination of whether or not probable cause existed for the issuance of a search warrant.

Under these facts there can be only one reasonable conclusion reached and that is that the State acted in the utmost good faith in prosecuting a violation of a valid State law. The entire procedure used in this case was designed to focus searchingly on the question of obscenity. *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

It is respectfully submitted that this case falls clearly within the doctrine announced by this Court in *Johnson* v. *Cameron*, 88 U.S. 1335. The Court held as follows:

> "But the question for the District Court was not the guilt or innocence of the persons charged; the question was whether the statute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights. The mere possibility of erroneous application of the statute does not amount 'to the irreparable injury necessary to justify a disruption or orderly state proceedings.' *Dombrowski* v. *Pfister, supra*, at 485. The issue of guilt or innocence is for the state court at the criminal trial; the State was not required to prove appellants guilty in the federal proceeding to escape the finding that the State had no expectation of securing valid convictions. Appellants say that the picketing was non-obstructive, but the State claims quite the contrary, and the record is not totally devoid of support for the State's claim."

The petitioners had State remedies readily available to determine the issue of whether or not probable cause existed for the seizure of the film. They could have made a motion to suppress the evidence and obtain the speedy hearing and

if the trial judge determined that probable cause did not exist then the evidence would have been returned to the petitioners. The petitioners could have also asked for and received a speedy trial within seven days to determine the issue of whether or not the motion picture was obscene.

The United States Court of Appeals for the Fourth Circuit suggested other methods of proceedings against alleged obscene material but this would be contrary to the holding in *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957).

In this cause, there are no special circumstances justifying the intervention of the federal courts. Turning again to *Johnson, supra,* it was held as follows:

> Appellants' case that there are "special circumstances" establishing irreparable injury sufficient to justify federal intervention must therefore come down to the proposition that the statute was enforced against them, not because the Mississippi officials in good faith regarded the picketing to violate the statute, but in bad faith to harass appellants' exercise of protected expression with no intention of pressing the charges or with any expectation of obtaining convictions, but knowing that appellants' conduct did not violate the statute. We agree with the District Court that the record does not establish the bad faith charged. This is therefore not a case in which ". . . a federal court of equity by withdrawing the determination of guilt from state courts could rightly afford petitioner any protection which they could not secure by prompt trial and appeal pursued to this Court." *Douglas* v. *City of Jeannette, supra,* at 164.
>
> We have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be unconstitutionally applied to suppress protected freedoms. See *Cox* v. *Louisiana, supra; Wright* v. *Georgia,* 373 U.S. 284; *Edwards* v. *South Carolina, supra.*

Under the foregoing authorities, Section 2283 of Title 28, U.S.C., prohibits a federal court from enjoining or abating the State criminal prosecution instituted against the Petitioners prior to the filing of the suit for injuncton. When public officials act in good faith in state prosecutions Section 1983, Title 42, U.S.C., creates no exception to this anti-injunction statute.

CONCLUSION

The prayer of the Petition for a Writ of Certiorari should be denied and the Respondents respectfully so ask.

Respectfully submitted,

JAMES B. WILKINSON
Attorney for the Commonwealth for the City of Richmond, Virginia

FRANK S. DULING
Chief of Police for the City of Richmond, Virginia

By JAMES B. WILKINSON

CERTIFICATE

I, James B. Wilkinson, do hereby certify that five copies of this reply brief were mailed to Joseph S. Bambacus, Esquire, 415 Mutual Building, Richmond, Virginia 23219, prior to the filing of this brief in Supreme Court of the United States.

JAMES B. WILKINSON

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,192

TYRONE, INC., a Virginia corporation, trading at Lee Art Theatre, and HOWARD WILLIAM BURTNETT,

Appellees,

v.

JAMES B. WILKINSON, Commonwealth's Attorney for the City of Richmond, Virginia, and FRANK S. DULING, Chief of Police for the City of Richmond, Virginia,

Appellants.

No. 13,193

TYRONE, INC., a Virginia corporation, trading at Lee Art Theatre, and HOWARD WILLIAM BURTNETT,

Appellants,

v.

JAMES B. WILKINSON, Commonwealth's Attorney for the City of Richmond, Virginia, and FRANK S. DULING, Chief of Police for the City of Richmond, Virginia,

Appellees.

(Argued March 7, 1969 Decided May 6, 1969).

Before, SOBELOFF, WINTER and BUTZNER, Circuit Judges.

James B. Wilkinson, Commonwealth's Attorney for the City of Richmond, Virginia, for appellants in No. 13,192 and appellees in No. 13,193; T. Wilson Hotze, Jr. and Joseph S. Bambacus for appellees in No. 13,192 and appellants in No. 13,193.

BUTZNER, Circuit Judge:

In October 1968 the defendants, the Commonwealth's Attorney and the Chief of Police for the City of Richmond, seized the film, "Angelique in Black Leather," at the Lee Art Theatre, which is operated by the plaintiffs.[1] They had a search warrant secured upon affidavits of four police officers and two lawyers, who, along with the magistrate who issued the warrant, had all viewed the film. Subsequently, the theatre was charged with possessing and exhibiting an obscene movie.[2] The theatre in turn brought

[1] Tyrone, Inc. is the lessee of the theatre. Howard William Burtnett is its manager. For convenience the plaintiffs will be referred to as the theatre. Generally the defendants will be referred to as the Commonwealth's Attorney. The police also seized previews or fliers of another film.

[2] The prosecution was initiated under Virginia's obscenity statutes. Va. Code Ann. § 18.1-227 to -236.4 (1960). Three times previously Lee Art films have been seized and convictions obtained. The first conviction, based on a seizure in March 1966, was overturned by the United States Supreme Court in *Lee Art Theatre, Inc.* v. *Virginia*, 392 U.S. 636 (1968). Another conviction, based on an August 1966 seizure, was not appealed. And a third, which followed a seizure in October 1966, is on writ of error to the Supreme Court of Appeals of Virginia. In October 1966 the police also seized, but later returned, Lee Art's projection equipment.

this action under 42 U.S.C. § 1983, alleging violation of its First, Fourth, and Fourteenth Amendment rights. The sole claim is that the Constitution required an adversary hearing to determine obscenity before the film could be seized. The thrust of the complaint is that the seizure and the threat of its repetition will result in the suppression of nonobscene material. Not at issue, therefore, are the constitutionality of Virginia's obscenity statutes or the obscenity of "Angelique."

The district court granted an injunction which required the Commonwealth's Attorney to return the film and prohibited the seizure of any other until its obscenity had been determined in an adversary hearing. The court refused, however, to enjoin the prosecution of the theatre in state court. On appeal, the Commonwealth's Attorney attacks the injunction, and the theatre seeks to expand it to include a ban on the prosecution. We enforce the injunction as written, except that we will require the theatre to make available a copy of "Angelique" for the preparation and trial of the criminal cases. *Metzger* v. *Pearcy*, 393 F.2d 202, 204 (7th Cir. 1968).

I.

In *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964), the Court reversed an order for the destruction of books which had been seized on a search warrant issued by a judge who had made only an *ex parte* determination of obscenity. The books had been impounded and later condemned as obscene after an adversary hearing. In reversing, four Justices of the Supreme Court found the seizure constitutionally insufficient because there had been no adversary hearing on the issue of obscenity before the books

were confiscated.[3] This decision, we believe, is applicable to motion pictures. The First and Fourteenth Amendments protect the expression of ideas through movies, *Burstyn* v. *Wilson*, 343 U.S. 495 (1952), and the reasons for an adversary hearing before seizure apply as strongly to them as they do to books. The hearing, of course, is not designed to facilitate the display of obscene material, for public obscenity is not constitutionally protected. *Roth* v. *United States*, 354 U.S. 476, 485 (1957); see *Stanley* v. *Georgia*, 37 U.S.L.W. 4315, 4318 (U.S. April 7, 1969) (dictum). On the contrary, as the opinion of the Court in *A Quantity of Books* makes clear, the purpose of the hearing is to safeguard against governmental suppression of nonobscene expression. With movies, as with books, "the separation of legitimate from illegitimate speech calls for sensitive tools . . . ." *A Quantity of Books* v. *Kansas*, 378 U.S. 205, 212 (1964), quoting *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958).

We find support in *Metzger* v. *Pearcy*, 393 F.2d 202 (7th Cir. 1968), where the Seventh Circuit required a prior adversary hearing in a situation identical to ours in every significant way. The police lacked a search warrant there, but that provides no basis for distinguishing the case because the court focused on the lack of the hearing. *Metzger* included a requirement, which we find reasonable and also adopt, that the theatre deliver to the Commonwealth's Attorney, upon request, a copy of the movie for reasonable use

[3] Mr. Justice Brennan wrote the opinion of the Court in which the Chief Justice, Mr. Justice White, and Mr. Justice Goldberg joined. Mr. Justice Black and Mr. Justice Douglas concurred because, on the basis of views they had previously expressed, the Kansas statute authorizing the destruction of the books violated the First and Fourteenth Amendments. Mr. Justice Stewart concurred on the ground that the books were not hard-core pornography. Mr. Justice Harlan and Mr. Justice Clark dissented because in their view Kansas could find the books obscene and seize them without an adversary hearing.

in the preparation and trial of the charges now pending in the state court.[4]

In holding that the Constitution requires an adversary hearing to determine obscenity before seizure of a movie, we do not imply that the hearing must be a fully matured action at law. Matters of comparable importance are often determined on an application for a preliminary injunction, after notice to the adverse party and an opportunity for him to be heard. Cf. *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957). An order to show cause why the film should not be seized as obscene presents another possibility. Va. Code Ann. § 18.1-236.3 (1960) *as amended* (Supp. 1968). But in whatever form, the proceedings must be "designed to focus searchingly on the question of obscenity." *Marcus* v. *Search Warrant*, 367 U.S. 717, 732 (1961).

II.

In assigning cross-error to the district judge's refusal to enjoin the state court prosecutions, the theatre urges that 28 U.S.C. § 2283 is not applicable.[5] This statute generally prohibits a federal court from staying proceedings in a state court. Nevertheless, the theatre argues, 42 U.S.C. § 1983[6]

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[4] We express, however, no opinion on the film's admissibility in evidence.

[5] 28 U.S.C. § 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

[6] 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

creates a statutory exception to § 2283 for the enforcement of First Amendment rights. We need not pursue this approach to the problem, for it is clear that the application for the injunction lacks equity.[7] Comity dictates denial of federal injunctive relief against state prosecutions that challenge First Amendment rights when it does not appear that the accused have "been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford [the accused] any protection which they could not secure by prompt trial and appeal pursued to this court." *Douglas* v. *City of Jeannette*, 319 U.S. 157, 164 (1943); cf. *Broyhill* v. *Morris*, ... F.2d ..... (4th Cir. 1969). On the other hand, suppression of First Amendment rights by bad faith enforcement of a statute unconstitutional on its face or as applied justifies immediate prohibition. Then the chilling effect on the full exercise of First Amendment freedoms results from the prosecution itself. Abatement need not await vindication in the criminal court. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); cf. *Zwickler* v. *Koota*, 389 U.S. 241 (1967). But here the theatre does not challenge either the constitutionality or the application of Virginia statutes forbidding the exhibition of obscene movies. Additionally, the Commonwealth's At-

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[7] The Supreme Court has expressly left open the question whether suits under 42 U.S.C. § 1983 constitute an exception to 28 U.S.C. § 2283. *Cameron* v. *Johnson*, 390 U.S. 611, 613,n.3 (1968); *Dombrowski* v. *Pfister*, 380 U.S. 479, 484, n.2 (1965). We have held that they do not. *Baines* v. *City of Danville*, 337 F.2d 579 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965). Accord, *Goss* v. *Illinois*, 312 F.2d 257 (7th Cir. 1963); *Sexton* v. *Barry*, 233 F.2d 220 (6th Cir. 1956). *Contra*, *Cooper* v. *Hutchinson*, 184 F.2d 119 (3d Cir. 1950); *Lansry* v. *Daley*, 288 F.Supp. 200 (N.D. Ill. 1968). See also, ALI Study of the Division of Jurisdiction between State and Federal Courts § 1372(7) (Tent. Draft No. 6, 1968)

torney, the district judge found, acted in good faith when he decided that under state and federal law the film could be seized for evidentiary purposes without a prior adversary hearing.

The theatre's attack upon this finding of good faith fails to establish that it is clearly erroneous. It has not been shown that the prosecutor sought to use the seizure as a covert device for suppression of the film by delaying trial. Nor has the earlier seizure of the projection equipment been repeated. More importantly, the Commonwealth's Attorney applied for a search warrant only after the magistrate had viewed the film. And he justifies this procedure by citing *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636 (1968), in which the same parties were involved. There the Court, in voiding a search warrant issued upon a single policeman's conclusion of obscenity, observed that it was unnecessary to decide "whether the justice of the peace should have viewed the motion picture before issuing the warrant." The Commonwealth's Attorney's interpretation of this remark cannot be equated with bad faith.

In sum, we have here good faith enforcement of an obscenity statute and no constitutional challenge to that statue. The district judge properly refused to enjoin the state court prosecutions. *Cameron* v. *Johnson,* 390 U.S. 611 (1968).

III.

The Commonwealth's Attorney argues that under 28 U.S.C. § 2281 this case should have been heard by a three-judge district court.[8] The film was seized in accordance with

[8] Title 28 U.S.C. § 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforce-

Virginia statutes setting out procedures for the search and seizure of contraband, including obscene material. Va. Code Ann. § 19.1-83 to -87 (1960), *as amended*, (Supp. 1968). An attack on the constitutionality of the seizure must therefore, he urges, be an attack on the constitutionality of Virginia's search and seizure statutes. This is true, he says, even though the theatre in its complaint, and consistently thereafter, has carefully limited its attack to the specific seizure, without charging that any Virginia statute is unconstitutional.

We conclude, however, that a three-judge court was not required. The theatre does not contest the authority of the Commonwealth's Attorney to seize obscene films. It simply asserts that first there must be an adversary hearing to determine obscenity. Virginia's search and seizure statutes require the judge or justice issuing the warrant to be satisfied that there is reasonable cause for the search. Generally, reasonable cause can be established from an affidavit, but the judge need not accept the affidavit alone, and nothing in the statutes prohibits him from conducting an adversary hearing, as the Constitution requires.[9] When, as here, statutes would be constitutionally applied if administered properly, a single judge has jurisdiction. Cf. *Chester* v. *Kinnamon*, 276 F. Supp. 717 (D.Md. 1967).

In *Phillips* v. *United States*, 312 U.S. 246, 251 (1941),

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ment or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

[9] Virginia also has established procedures—not used here—to provide an adversary hearing before seizure of motion picture films. Va. Code Ann. § 18.1-236.3 (1960), as amended, Va. Code Ann. § 18.1-236.4 (Supp. 1968).

Mr. Justice Frankfurter, holding a three-judge court unnecessary in an analogous situation wrote:

> "The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases.
>
> "Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the congressional scheme of [28 U.S.C. § 2281]. It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law. In other words, it seeks a restraint not of a statute but of an executive action. But the enforcement of a 'statute,' within the meaning of [28 U.S.C. § 2281], is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness."

No. 13,192 is remanded to permit the district court to amend its injunction to make the film reasonably available to the Commonwealth's Attorney. In all other respects, the judgment is affirmed.

No. 13,193 is affirmed.